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No. 80-801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

v.

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does New York Banking Law § 268, by prohibiting the sale of savings bank life insurance to most nonresidents of New York, violate a fundamental right of those nonresidents and create an unjustified discrimination in New York's life insurance market in violation of the Privileges and Immunities Clause, Art. IV, § 2, and Commerce Clause Art. I, § 8, cl. 3, of the U.S. Constitution?

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JURISDICTIONAL STATEMENT

This case was remanded for "further consideration in light of *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978)." 438 U.S. 901 (1978). Relying upon *Baldwin* v. *Fish and Game Commission of Montana*, 436 U.S. 371 (1978), the district court reaffirmed its early judgment, holding that nonresidents of New York do not have a "fundamental" right under the Privileges and Immunities Clause, U.S. Constitution, Art. IV § 2, to purchase life insurance from New York savings banks. New York Banking Law, Art. VI-A authorizes New York savings banks to sell life insurance. However, under Banking Law § 268, only persons who reside or regularly work in New York can pur-

chase this insurance. Nonresidents of New York are denied the right to purchase a low cost, high quality life insurance and also are denied the benefits which competition from savings banks could bring from other life insurers. The district court's decision permitting discrimination against nonresidents of a state in the market for such an important consumer product should be given plenary review by this Court.

OPINIONS BELOW

The first opinion of the district court is reported at 427 F.Supp. 840 (S.D.N.Y. 1977), *vacated and remanded*, 438 U.S. 901 (1978). The opinion on remand is not yet reported. It is set forth at pages 1a-22a herein.

JURISDICTION

This action originally challenged the constitutionality of both Sections 266[1] and 268 of the New York Banking Law on various constitutional grounds. Jurisdiction was based upon 28 U.S.C. §§ 1331(a) and 1343(3). A three-judge district court was convened pursuant to 28 U.S.C. § 2281. Summary judgment was entered for the appellee on February 28, 1977, and that judgment was vacated and remanded by this Court on June 26, 1978.

On remand, summary judgment was entered in favor of the appellee on August 14, 1980. A notice of appeal was filed on September 17, 1980.

This Court has jurisdiction over the appeal under 28 U.S.C.§ 1253.

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[1]Section 266 restricts the insurance on any risk to $30,000. The judgment of the district court upholding the constitutionality of this section was not appealed.

STATUTE INVOLVED

Section 268 of the New York Banking Law provides:

> *Geographical Limitation*
>
> No application for [savings bank life] insurance shall be accepted except from a resident of this state or a person working regularly therein.

STATEMENT OF THE CASE

1. *Facts*

On December 5, 1973, appellant Edward J. Gorin, a resident of New Jersey employed in New Jersey, walked into the Savings Bank of Rockland County and applied for $30,000 of savings bank life insurance ("SBLI"). His application was refused solely because as a nonresident who worked in New Jersey, he was prohibited by Section 268 from purchasing SBLI. Stip.¶ 4.[2]

New York Banking Law, Art. VI-A authorizes savings banks to "conduct the business of life insurance" by establishing life insurance departments. Banking Law §§ 262, 263. The savings banks may act with "all the rights, powers, and privileges and subject to all duties, liabilities and restrictions relating to domestic legal reserve life insurance companies conferred or imposed by the insurance law. . ." *Ibid.* One hundred twelve of New York's 115 savings banks sell life insurance, either as issuing banks or as agents for issuing banks. Stip.¶ 26. As of 1977, $6.8 billion of SBLI was in force, with $965.8 million sold that year. Stip.¶ 38.

This life insurance is one of the best buys available anywhere. In studies in 1974 and 1980, Consumers Union

[2]The factual records consists of the Stipulation on Remand ("Stip.") and joint appendix.

found only Massachusetts SBLI to be less costly in most categories. Stip.¶ 1.[3] *Best Reports*, an authoritative publication on the characteristics of life insurance, rates SBLI as "remarkably low" cost. Stip. ¶ 47. This difference in premium costs can total many hundred of dollars over the life of an insurance policy, even though the policies have similar terms. Stip. ¶ 9; Pltfs. Exhs. 2-6. Further, customer satisfaction appears to be high as the Banking Department received no consumer complaints about SBLI from 1971 to 1976, the period of the stipulation. Stip. ¶ 16.

Section 268 restricts the sale of SBLI to residents and those regularly working in New York. On April 12, 1957, the Board of Trustees of the Savings Bank Life Insurance Fund interpreted Section 268 as restricting the sale of SBLI to (1) natural persons who live or regularly work in New York who insure themselves or a person with respect to whom they have an insurable interest (the so-called "blood relative" exception) and (2) New York corporations, foreign corporations with their principal place of business in New York and unincorporated associations with their principal place of business in New York if they qualify for and purchase group policies. Those who purchase SBLI may retain their policies if, subsequent to purchase, they move away from the state or no longer regularly work in the state. Stip.¶ 41.

The Saving Bank Life Insurance Fund was established to provide insurance expertise for the savings banks. The Fund acts in a fashion similar to the home office of a life insurance company, providing all technical life insurance services including actuarial, underwriting and medical services. The Fund establishes uniform terms and conditions for the policies, prescribes the standard form policies, ap-

[3]See, "A Guide To Life Insurance," *Consumer Reports,* (January, February, March, 1974, and February, March, 1980).

plications, schedules and other business records, and establishes uniform premiums, annuity rates, loan values, surrender charges, collection fees and reinsurance rates. The banks sell the insurance, make the profit and retain and invest the reserves. Banking Law §§ 270, 271. Stip. ¶ 28.

The Fund is supported entirely from assessments and contributions from the savings banks and through investment of its own money. Stip. ¶ 29. Banking Law § 270 specifically prohibits the use of "public funds, moneys of the state or under state control or subject to audit by the state comptroller" to support the Fund or the savings banks. The sale of SBLI is carried on through private enterprise and for private profit. Stip. ¶¶ 29, 31, 32. The regulation of the savings banks is designed to be as close as practicable to the regulation of other insurers. Stip. ¶¶ 30-33. See also, Historical Note to Banking Law § 270.

Louis D. Brandeis first proposed savings bank life insurance in 1907 as a competitive alternative to industrial life insurance,[4] which is sold in small face amounts generally to blue-collar workers, with premiums collected weekly or bi-monthly at the policyholder's home. Stip. ¶ 12. Industrial life insurance is expensive and subject to many abusive practices. Stip. ¶¶ 14-17. In 1905, industrial life insurance was severaly criticized by Mr. Brandeis, as counsel for policyholders of the Equitable Life Assurance Society,[5] and by the Armstrong Committee, an investigative committee of the New York legislature. Stip. ¶¶ 14, 15. That criticism has continued through the years as a result of several legislative inquiries and was recently

[4]Louis D. Brandeis, "Savings Bank Life Insurance For Wage Earners," 1907 *Albany Law Journal* 50. Stip. ¶ 19; Deft. Exh. A.

[5]Louis D. Brandeis, "Life Insurance: The Abuses and the Remedies," published by the Policy-Holders Protective Committee.

renewed by Consumers Union[6] and by the Federal Trade Commission[7] Stip. ¶¶ 1,17. Although more strictly regulated in recent years, $39.2 billion of this insurance was in force nationwide in 1976. Stip. ¶ 13. No geographical limitation is imposed by New York on the sale of industrial life insurance.

Mr. Brandeis was convinced that workers would best be protected from the abuses of industrial life insurance through competition from mutual savings banks which had been organized principally to serve the interests of working people. Stip. ¶ 19. Massachusetts adopted the Brandeis proposal in 1907. New York followed in 1938 after several unsuccessful efforts. Connecticut adopted an SBLI program in 1941. No other state has authorized savings banks to sell life insurance. Stip. ¶ 20. The geographical limitation is found in each of the state SBLI statutes. Stip. ¶ 39.

2. Proceedings before the Three-Judge District Court

On January 14, 1974, the appellant and Ira Furman, a resident of New York seeking to purchase more than $30,000 of SBLI, commenced this action against the Superintendent of Banks of New York, Harry W. Albright, Jr. (first succeeded by John G. Heimann and now by Muriel Siebert). The amended complaint alleged that Section 268 ("the geographical limitation") and Section 266 ("the policy ceiling") violated various provisions of the New York and United States constitutions. On September 20, 1974, U.S. District Judge Lee P. Gagliardi

[6]"Insurance That Preys on the Poor," *Consumer Reports* (November 1978).

[7]Office of Policy and Planning, Federal Trade Commission, "Life Insurance Sold To The Poor: Industrial And Other Debit Insurance," (January, 1979).

denied appellee's motion to dismiss, and a three-judge court was convened. On February 25, 1977, the three-judge district court denied appellants' motion for summary judgment and exercised its discretion to grant summary judgment for appellee who had not filed a cross-motion.

Consumers Union and Edward Gorin filed a direct appeal to this Court challenging the district court's decision upholding Section 268. Ira Furman did not appeal, and no appeal was taken from the decision upholding Section 266. This Court vacated the district court judgment and remanded for further consideration in light of *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), a decision made four days prior to the remand. No mention was made in the remand order of *Baldwin* v. *Fish and Game Commission of Montana*, 436 U.S. 371 (1978), a decision made one month prior to *Hicklin*.

On remand, appellants again moved for summary judgment on September 13, 1978. At the request of the court, the parties tried and were successful in reaching a stipulation of facts and joint appendix. Appellee then filed a cross-motion for summary judgment, and briefing was completed. Oral argument was heard on September 17, 1979. The court reaffirmed its earlier ruling, upholding the constitutionality of Section 268 by a decision filed on August 14, 1980.

The New York State Association of Life Underwriters filed an *amicus curiae* brief in support of the geographical limitation. The Federal Trade Commission also submitted an *amicus curiae* brief setting forth the findings of its study of industrial life insurance.[8] The Commission did not take a position on the legal issue or align itself with either party.

[8]See *ante* footnote 7.

3. The Three-Judge Court's Opinions

The first district court opinion rejected appellants' Privileges and Immunities Clause challenge on the grounds that valid independent reasons justified the discrimination. 427 F.Supp. 840 (S.D.M.Y. 1977). The district court found that there would be unspecified "harmful effects of nationwide SBLI sales" and a "threat to traditional banking functions that sales to persons without a nexus to the state (work or residence) would create." *Id.* at 846. Under the district court's analysis, the geographical limitation failed "in privileges and immunities terms, to place a burden or penalty on out-of-state citizens for the benefit of in-state citizens." *Id.* at 846.

On remand, the district court never reached an analysis of *Hicklin* v. *Orbeck,* 437 U.S. 518 (1978), as ordered by this Court. Instead, the court found that the geographical limitation did not infringe a "fundamental" right under *Baldwin* v. *Fish and Game Commission of Montana,* 436 U.S. 371 (1978). App. 14a. SBLI was deemed a "legislatively created, non-state subsidized, social welfare program." App. 15a. As a state "resource," New York was free to limit SBLI's sale to New York residents, as set forth in the dissent in *Salla* v. *County of Monroe,* 48 N.Y.2d 514, 399 N.E.2d 909 (1980), *cert. denied sub nom. Abrams* v. *Salla,* 100 S. Ct. 1836 (1980). *Ibid.*

To bolster this conclusion, the court relied upon *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976) and *Reeves, Inc.* v. *Stake,* 100 S.Ct. 2271 (1980), where states had entered the markets for the purchase of automobile hulks and the production of cement, respectively. Although New York had not entered the life insurance market, the court viewed New York as the creator of SBLI. *Ibid.* The court found that in this circumstance,

cumstance, *Alexandria Scrap* "suggest[ed] a growing judicial solicitude for efforts by states to protect the . . . needs of their residents . . ." App. 16a-17a.

The *Reeves* decision was found instructive in two respects. Relying upon this Court's finding that South Dakota did not possess unique access to the materials needed to produce cement, 100 S.Ct. at 2281, the district court found that "each state is free to create its own SBLI in 'a condition of plentitude' and each state's SBLI program operates without disadvantaging any other state's program . . ." App. 18a. Thus, the district court concluded that nonresident consumers should petition their own state legislators to create "a form of low cost high quality industrial life insurance. App. 19a.

In further reliance on *Reeves,* the district court found that SBLI was "social insurance" designed to protect the wage-earner and that it "was a legislatively created alternative to commercial industrial life insurance which was designated to eradicate certain perceived social evils." App. 20a, 22a. Citing this Court's statement in *Reeves* that voiding South Dakota's resident only policy "would interfere significantly with a state's ability to structure relations exclusively with its own citizens," 100 S.Ct. at 2279-2280, the district court found that the sale of SBLI was properly limited to those who were the "appropriate objects of New York's legislative concern." App. 22a.

Thus, the district court upheld the constitutionality of Section 268, denied appellant's motion for summary judgment and granted appellee's cross-motion for summary judgment.

ARGUMENT

Banking Law § 268 denies most nonresidents of New York an excellent life insurance product, as well as the benefits of competition which this insurance would provide to other life insurers. Both the Privileges and Immunities clause and the Commerce Clause were designed to assure individuals and businesses access to the goods and services of all states and to foster competition which would serve to protect consumers nationwide. The geographical limitation strikes at the very heart of these purposes.

Further, by ruling that discrimination in the life insurance market does not touch upon a fundamental right, the district court has potentially eliminated almost every consumer product from consideration under the Privileges and Immunities Clause. By ruling that New York "created" SBLI when it authorized its sale, the district court has suggested that discrimination against nonresidents is broadly permitted in regulated industries. This Court should grant plenary review due to the potentially broad impact of this decision on markets for consumer products, particularly on the market for life insurance.

New York permits nonresidents to purchase the high priced and highly criticized industrial life insurance, as well as every other form of life insurance except its best product, savings bank life insurance. This discrimination violates nonresidents' basic right of free access to trade which has been consistently associated with the Privileges and Immunities Clause. The Chief Justice noted while concurring in *Baldwin* v. *Fish and Game Commission of Montana,* 436 U.S. 371, 394 (1978), that, "The Clause assures noncitizens the opportunity to purchase goods and services on the same basis as citizens . . ." See also, *Doe* v. *Bolton,* 410 U.S. 179 (1973). Cf. *Toomer* v. *Witsell,* 334

U.S. 385 (1948). This right has been repeatedly enumerated as a fundamental right. *Hicklin* v. *Orbeck,* 437 U.S. 518, 524 (1978); *Ward* v. *Maryland,* 12 Wall. 418, 439 (1870) ("right . . . to acquire personal property"); *Paul* v. *Virginia,* 8 Wall. 168, 180 (1868) ("acquisition and enjoyment of property"); *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 552 (No. 3230 (CCED Pa. 1825)) ("the right to acquire and possess property of every kind"). The Fourth Article of Confederation from which the Privileges and Immunities Clause was derived guaranteed nonresidents "all the privileges of trade and commerce . . ." *Austin* v. *New Hampshire,* 420 U.S. 656, 660 (1975).

If discrimination in the market for life insurance does not touch upon a fundamental right, then few consumer products could meet the *Baldwin* test. In 1977, 86 percent of American families owned life insurance. The average policy was $36,900. $2,583 billion in life insurance was in force and $367 billion was sold in that year. Premium income was $33 billion.[9] Very few goods or services are as widely purchased by consumers in all economic strata as life insurance.

Even in limiting the market to SBLI, the fundamental right test should be met. In 1977, approximately $6.8 billion of New York SBLI was in force and approximately $965.8 million was sold in that year. Stip. ¶ 38. In 1974, New York SBLI ranked 70th in insurance in force out of a total of 1800 life insurers in the United States, and it ranked 6th in the sale of individual life insurance policies among the 114 life insurers doing business in New York. *Ibid.*

Thus, the district court has erred in analogizing SBLI to the elk hunting in *Baldwin. Baldwin* involves a luxury

[9]American Council of Life Insurance, *Life Insurance Fact Book, 1978,* 7-9 (1979).

sport which is available to only a few wealthy individuals even without price discrimination. That discrimination hinders few, if any, from hunting. Yet, the licensing fee is part of a regulatory scheme to protect a scarce natural resource, a subject matter over which the states have traditionally had broad discretion. By contrast, the geographical limitation infringes upon the right to free trade which has consistently been found to be "fundamental." Further, life insurance is considered a necessity by many consumers and involves billions of dollars of commerce each year. By failing to distinguish *Baldwin,* the district court has suggested a broad expansion of its scope which could serve to undermine the protection provided by the Privileges and Immunities Clause.

This district court, however, considered SBLI's origins as excluding it from the scope of the Privileges and Immunities Clause. The gist of the district court's analysis can be found in its description of SBLI as "a legislatively created, non-state subsidized, social welfare program." App. 15a. In the district court's view, New York "created" SBLI and, therefore, can limit its sale to the "appropriate objects of New York's legislative concern." App. 22a.

Despite its unique history, New York "created" SBLI only to the extent it "created" all forms of insurance, by authorizing its sale. As stated by Theodore Fuller, President of the Savings Bank Life Insurance Fund:

> What is Savings Bank Life Insurance? It is regular legal reserve life insurance sold by savings banks . . .[10]

[10]Statement of Theodore Fuller, President, Savings Bank Life Insurance Fund, New York, New York before the Senate Subcommittee on Antitrust and Monopoly, hearings on competition in life insurance, February 21, 1973. Stip. ¶ 8. Def. Exh. B.

Through Banking Law, Art. VI-A, New York has authorized savings banks to enter the "business of life insurance." Banking Law § 263. The insurance is actually created in private contracts between the insurer and the insured. Stip. ¶ 11. The policies are of the same kind as policies sold by other insurers. Stip. ¶¶ 44, 45. The savings banks bear the entire cost of its sale and pay all policy proceeds. The profits are retained by the savings banks. Stip. ¶ 32. The regulation of the savings banks is designed to be as close as practicable to the regulation of other insurers. Stip. ¶¶ 30-33. See Historical Note to Banking Law § 270. *New York Savings Bank* v. *Joseph,* 118 N.Y.S.2d 893, 281 App. Div. 815 (1953) (savings banks taxed as mutual insurance companies).

The district court's reliance on *Hughes* v. *Alexandria Scrap,* 426 U.S. 794 (1976) and *Reeves, Inc.* v. *Stake,* 100 S.Ct. 2271 (1980) to support its "creation" theory is misplaced. In both cases, the states using taxpayer funds entered the markets for the products at issue. New York has not entered the market for life insurance. The district court found that the insurance is "non-state subsidized." App. 15a. New York has simply authorized savings banks to sell life insurance and has established a regulatory structure for its sale. Banking Law § 270 explicitly prohibits the use of state funds to support these sales. In *Reeves,* this Court said that, "The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." 100 S.Ct. at 2277. The district court has failed to make this distiction.

Yet, the Court has considered this distinction to be extremely important. Under the Commerce Clause, "a virtual per se rule" of invalidity exists for statutes that attempt to prevent goods and services from crossing states lines. *Philadelphia* v. *New Jersey,* 437 U.S. 617, 624

(1978). This Court has consistently struck down state statutes which embargo the export of products. See, e.g., *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979) (natural minnows); *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970) (unprocessed cantalopes); *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949) (milk). Similar harsh treatment has faced importation bans. See, e.g., *Philadelphia* v. *New Jersey, supra; Great Atlantic & Pacific Tea Company, Inc.* v. *Cottrell,* 424 U.S. 366 (1976) (milk).

Similarly, under the Privileges and Immunities Clause, the Court has sought to prevent limitations on the flow of goods and services by prohibiting discrimination against nonresidents in the general economy of the states. The Court has authorized discriminatory taxes and fees against nonresidents to equalize the benefits and burdens of state-funded activities. E.g., *Travellers' Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1902). See also, *American Commuter Ass'n* v. *Levitt,* 279 F.Supp. 40 (S.D.N.Y. 1967), *aff'd,* 405 F.2d. 1148 (2d Cir. 1969). However, when these taxes and fees have gone beyond equalizers and have discriminated against nonresidents, they have been struck down. *Austin* v. *New Hampshire,* 420 U.S. 656 (1975); *Toomer* v. *Witsell,* 334 U.S. 385 (1948). The Court has never permitted the type of discrimination found in this case where the residents make no special contribution to SBLI and, therefore, can limit its sale to the "appropriate objects of New York's legislative concern." App. 22a.

The district court has suggested that there is no discrimination in the geographical limitation because New York cannot prevent other state legislatures from enacting an SBLI statute. App. 18a. However, this argument was specifically rejected by this Court in *Austin* v. *New Hampshire, supra* and *Travis.* v. *Yale & Towne Mfg. Co.,* 252 U.S. 60 (1920). In both cases, nonresident income taxes were being challenged under the Privileges and Immunities

Clause. Both states argued that the resident states of the plaintiffs could eliminate the discrimination by enacting similar taxing statutes. The Court rejected this argument, and in *Austin* said:

> . . . the constitutionality of one State's statute affecting nonresidents [cannot] depend upon the present configuration of the statute of another state.

Id. 420 U.S. at 668. Even if other states enacted SBLI, there still would be discrimination in the New York market, and no guarantee that the SBLI sold would be as inexpensive as New York SBLI.

The district court opinion implies that expanding the availability of SBLI will undermine a New York "social welfare program." App. 20a-22a. However, the appellee has not argued – and nothing in the record suggests – that lifting the geographical limitation will impair the SBLI system or limit the amount of insurance available to New Yorkers. In fact, the district court found that SBLI is created in a "condition of plentitude." App. 18a. Further, a basic tenet of insurance economics is that an insurance system is made safer by expanding the base of the risks.[11]

Expanding the availability of SBLI is likely to increase competition in the insurance markets and possibly force other insurers to lower their prices in order to compete. Rather than denying New Yorkers benefits, the expansion of SBLI may create greater benefits by making a wider variety of inexpensive insurance available. The Commerce Clause and the Privileges and Immunities Clause were conceived, at least in part, to encourage nationwide competition. See, *Hicklin* v. *Orbeck*, 437 U.S. at 525; *Great*

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[11]S.S. Huebner & Kenneth Black, Jr., *Life Insurance*, 3-7 (8th Ed. 1972).

Atlantic & Pacific Tea Company, Inc. v. *Cottrell,* 424 U.S. 366 (1976); *H. P. Hood & Sons, Inc.* v. *DuMond,* 366 U.S. 525, 539 (1949). In fact, it was the salutary effects of competition which prompted Mr. Brandeis to propose SBLI. Stip. ¶ 19.

Thus, Banking Law Art. VI-A is a business regulation which through Section 268 discriminates against nonresident consumers. If the district court is correct, New York or any other state could similarly restrict the sale of any form of insurance to its residents and significantly decrease the competition which protects all consumers. The district court's finding that Section 268 does not infringe upon a fundamental right, therefore, cannot be sustained.

Further, when reaching *Hicklin* v. *Orbeck,* 437 U.S. 518 (1978), as originally ordered by this Court, the purported justifications for the discrimination do not support the severe discrimination in Section 268. In its first opinion, the district court found that the geographical limitation was adopted as a means (1) to limit the life insurance business of savings banks, (2) to provide a benefit to those with an economic nexus to the state, and (3) to preserve the local character of savings banks. 427 F.Supp. at 844, 845-846. On remand, the appellee tried to bolster its case with two additional justifications: (4) to avoid a nationwide market for SBLI, and (5) to allocate competition between savings banks and other insurers in the interstate sales of life insurance.

Under *Hicklin,* discrimination against nonresidents can be justified only when nonresidents are the "peculiar source of the evil" at which the legislation is addressed, 437 U.S. at 525, and even assuming that they "cause or exacerbate" the problem, the solution must bear a

"reasonable relationship between the danger represented by nonresidents as a class and the . . . discriminations practiced against them." *Id.* at 526.

The "evil" which SBLI was enacted to combat was the abuses in the sale of industrial life insurance. Stip. ¶¶ 14-21. Rather than being among the "peculiar source of the evil," nonresidents of New York are among the injured class. The "evil" at which the geographical limitation is directed is unclear. The legislative history to Banking Law, Art. VI-A does not provide any reasons for the enactment of this limitation. There also is no evidence that the limitation was contained in Brandeis' original proposal. Further, Harry Albright, as Superintendent of Banks, stipulated that he did not know any reasons for the limitation. Stip. ¶ 43.

On its face, the geographical limitation appears simply to be a means of limiting the competition which savings bank could provide to other insurers. The limitation appears to provide no apparent benefit to residents of New York since there is no limit on the amount of life insurance a savings bank can sell. On the other hand, Section 268 appears to limit the taxes which New York would collect from expanded sales. While the parties have no accepted basis for estimating the untapped demand, Stip. ¶ 42, on each occasion when the policy ceiling has been raised, a sharp increase in sales has followed.[12] Further, New York residents are denied potential benefits which added competiton in the insurance markets could provide from out-of-state insurers.

Apparently for the purpose of this suit, New York has conjured up six purported evils to justify the harsh discrimination in Section 268. None of the purported evils

[12]See Answers of Theodore Fuller to Plaintiffs' Interrogatories, No. 15. Pltfs. Exh. 1.

are uniquely caused by nonresidents, and the total ban on sales to nonresidents certainly is not in proportion to their contribution to these so-called evils.

Specifically, nonresidents are not a potential unique source for an imbalance between savings and insurance business in savings banks. The same imbalance could be caused by the insurance business from New York residents. Further, other means to this end, like the $30,000 policy ceiling, do not infringe upon nonresident rights.

The purpose to provide a benefit for those with an economic nexus to the state is not undermined by permitting sales to nonresidents, since SBLI is not a limited resource. App 18a. Further, if this justification were sufficient, almost any discrimination against nonresidents could be justified since almost all statutes that discriminate against nonresidents benefit residents, directly or indirectly. *Brown* v. *Anderson*, 202 F. Supp. 96 (D. Alaska 1962). The Privileges and Immunities Clause was intended to eliminate "the practice of some States denying to outlanders the treatment that its citizens demanded for themselves . . ." *Austin* v. *New Hampshire*, 420 U.S. *supra* at 660-661.

The purpose to preserve the local character of savings banks appears to be particularly contrived. No such goal is listed in the Declaration of Policy, Banking Law § 10, and no other provision of the statute appears to be aimed at that goal. The same justification recently was rejected by this Court in *Lewis* v. *BT Investment Managers, Inc.*, 100 S.Ct. 2009, 2019 (1980).

The purpose to avoid a nationwide market for SBLI is a statement of "economic Balkanization" which is contrary to the purposes of the Privileges and Immunities Clause and the Commerce Clause. *Hughes* v. *Oklahoma*, 441

U.S. *supra* at 325. A state cannot "overtly [block] the flow of interest commerce at its borders." *Philadelphia* v. *New Jersey*, 437 U.S. *supra* at 624. Further, no harmful effect of a nationwide market has been explained by appellee.

Finally as a means to allocate competition, the geographical limitation does not meet the *Hicklin* test. Consumers are entitled to be protected by the competition among insurance companies. Nonresidents do not present a "peculiar evil" justifying interference with vigorous competitoin. Allocation of markets cannot be accomplished at nonresidents' expenses.

Thus, the geographical limitation infringes upon a fundamental right of free access to trade which is protected under the Privileges and Immunities Clause and the Commerce Clause. This infringement cannot be justified under the analysis in *Hicklin* v.*Orbeck, supra*, and therefore the limitation should be declared unconstitutional.

CONCLUSION

The foregoing considered, this Court should note probable jurisdiction because of the potentially broad impact of the district court's decision on markets for consumer products, particularly the insurance market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of appellants' Jurisdictional Statement were served by deposit in a U.S. post office box for first class mail, with postage prepaid, upon counsel for all of the parties required to be served: Judith A. Gordon, Asst. Attorney General, 2 World Trade Center, New York, N.Y. 10047; Henry Mark Holzer, Bennett, Ayervas & Bertrand, 70 Pine Street, New York, N.Y. 10005; Stephen H. Meyer, Federal Trade Commission, Bureau of Consumer Protection, Washington, D.C. 20580, on the 17th day of November 1980, in accordance with the provisions of Rule 28.

Alan Mark Silbergeld

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMERS UNION OF
UNITED STATES, INC. and
EDWARD J. GORIN,

74 Civ. 234 (LPG)

Plaintiffs,

– against –

OPINION

MURIEL SIEBERT,
Superintendent of Banks
of the State of New York,
Defendants.

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Before VAN GRAAFEILAND, Circuit Judge, and GAGLIARDI and KNAPP, District Judges

GAGLIARDI, District Judge

Plaintiffs, Consumers Union of the [sic] United States, Inc. ("Consumers Union"), a New York non-profit corporation, Edward J. Gorin, an individual who both resides and regularly works in New Jersey, and Ira J. Furman, an individual, who resides in New Jersey but regularly works in New York, commenced this lawsuit against the Superintendent of Banks of the State of New York[1] to enjoin the enforcement of Sections 266 and 268 of New York's Banking Law, N.Y. Bank Law §§ 266 & 268 (McKinney 1971), on the ground that the statutes violate various provisions of the state and federal constitutions.

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[1]Muriel Siebert was substituted for John G. Heiman as defendant pursuant to Rule 25(d), Fed. R. Civ. P.

Article VI-A of the New York Banking Law authorizes any savings bank in New York to sell life insurance ("savings bank life insurance" or "SBLI") and establishes a program to regulate its sale. Section 266 limits the maximum policy that may be issued to $30,000 ("the policy limitation") and Section 268 limits the sale of SBLI to residents of New York or persons who work regularly in New York ("the geographical limitation").[2] By opinion dated February 27, 1977, this three judge court[3] upheld the constitutionality of these statutes against a variety of constitutional challenges[4], denied plaintiffs' motion for summary judgment and entered judgment for the defendant pursuant to Rule 54 (c), Fed. R. Civ. P. *Consumers Union Inc. v. Albright,* 427 F. Supp. 840 (S.D.N.Y. 1977). Plaintiffs Consumers Union and Edward Gorin appealed to the Supreme Court that portion of the judgment upholding the constitutionality of Section 268.[5] On June 26, 1978, the Supreme Court vacated the judgment of this court and remanded the case "for further consideration in light of *Hicklin v. Orbeck,* 437 U.S. 518 (1978)," an Article IV privileges and immunities clause case decided four days earlier. *Consumers Union v. Heiman,* 437 U.S. 901 (1978). On remand, plaintiffs and defendant cross move for sum-

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[2]Section 268 provides that "[n]o application for insurance shall be accepted except from a resident of this state or a person working regularly therein.

[3]The Honorable Ellsworth A. Van Graafeiland was substituted for the Honorable Paul R. Hays by order dated July 6, 1979.

[4]By its previous decision, this court upheld the constitutionality of Section 268 under (1) the equal protection clauses of the Federal and New York State Constitutions, (2) the due process clause of the State Constitution, (3) the commerce clause of the Federal Constitution, and (4) the privileges and immunities clauses in Article IV and the fourteenth amendment of the Federal Constitution.

[5]Plaintiff Ira Furman, who challenged only the policy limitation set forth in section 268, did not appeal.

mary judgment pursuant to Rule 56, Fed. R. Civ. P. For the reasons set forth below, this court adheres to its previous decision and grants defendant's motion for summary judgment.

Statement of Facts[6]

Commercial insurers, such as the Prudential Life Insurance Company of America ("Prudential") and Metropolitan Life Insurance Company ("Metropolitan"), have sold industrial life insurance since the 1870's. Commercial insurers have typically sold this type of life insurance in small face amounts (no more than $1,000) and their agents have usually collected the weekly of bimonthly premiums at the policyholder's home. Industrial life insurance has been purchased usually by blue collar wage earners for themselves and their dependents and has been called "workingman's insurance" for this reason. Although commercial insurers other than Prudential and Metropolitan began selling industrial life insurance in the early portion of the twentieth century, Prudential and Metropolitan were still writing seventy per cent of the $16.7 billion of the industrial life insurance policies in force nationwide in 1939.

On September 5, 1905, a joint New York legislative committee, entitled the Armstrong Committee, commenced a study of the then essentially unregulated commercial life insurance industry in New York State. The Committee found that "unchecked competition, particularly among

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[6]The Record before this court from which its factual recitation is drawn consists of a stipulation entitled "Stipulation on Remand from the Supreme Court of the United States" (hereinafter cited as "Stipulation ¶ "), and a joint appendix consisting of plaintiffs' and defendant's exhibits to the stipulation (hereinafter cited as "Joint App."). The stipulation expressly supersedes all Local Rule 9(g) statements that had been previously filed in this action (Stipulation ¶6).

the large insurers that controlled the bulk of the business, had produced a chaotic situation and permitted the development of undesirable practices that were inconsistent with the public interest". (Stipulation ¶14). The Committee found, *inter alia,* that commercial insurers earned substantially higher profits from industrial life insurance policies than from ordinary policies and that industrial life insurance policyholders, compared to ordinary life insurance policyholders, paid higher premiums, obtained little or no equity in their policies and held policies with higher lapse rates.[7] The New York State Insurance Department and various legislative committees made subsequent studies of industrial life insurance between 1936 and 1939. These studies, like the Armstrong Committee Report, showed excessively high lapse rates for industrial life insurance policies and generally higher policy costs for industrial as compared with ordinary life insurance policies.[8]

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[7]The parties agree that:

> [a]pproximately 58% of industrial life policies lapsed in the first three years they were in force compared with 42% of ordinary life policies. Approximately one-third of industrial policies did not survive three months. Approximately one-half did not survive one year. Industrially insured individuals generally did not obtain equity in their policies until the policies had been in force for five years.

(Stipulation ¶15).

[8]Apparently very little has changed in the industry since 1939:

> In January 1979, the Office of Policy and Planning of the United States Federal Trade Commission issued a report entitled "Life Insurance Sold to the Poor: Industrial and Other Debit Insurance" that characterizes industrial policies as expensive, having high lapse rates and affected by questionable contract terms and selling practices when compared to other (non-industrial) life insurance policies now available.

(Stipulation ¶17).

The New York legislature was not alone in its concern about the undesirable practices occurring in connection with the sale of industrial life insurance. In 1905, policyholders of the Equitable Life Assurance Society formed the Policyholders Protective Committee to investigate possible abuses in the management and administration of that company and engaged Louis Brandeis as its counsel. In 1907, Brandeis published an article in *The Albany Law Journal* entitled "Savings Bank Life Insurance for Wage Earners".[9] After reviewing data regarding such items as the cost and lapse rates of industrial life insurance to both New York and Massachusetts "workingmen", Justice Brandeis concluded that:

> [t]he extraordinary wastefulness of the present system of industrial insurance is due in large part to the fact that the business, whether conducted by stock or by mutual companies is carried on for the benefit of others than the policyholders. . . . A life insurance company for workingmen should, as to each policyholder, be conducted, like a savings bank, as a benevolent institution.

(Joint App. 120-21). Brandeis proposed that "state legislatures create an alternative form of insurance, 'savings bank life insurance', to be sold in competition with industrial policies through state chartered savings banks." (Stipulation ¶19). Savings banks, Brandeis contended, were the type of institution "singularly conducive" to providing low cost, high quality life insurance to individuals of moderate means since "the insurance department of savings banks would open with an extensive and potent

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[9]1907 *Albany Law Journal* 50. Brandeis' article refers to a similar proposal made in 1865 by Elizur Wright. (Stipulation ¶10).

goodwill. . . . The safety of the institution would be unquestioned, and a small amount of advertising would soon suffice to secure a reasonably large business without solicitors." (Joint App. 122). Indeed, the parties have agreed that New York savings banks were organized principally to provide working people with fiscally sound, interest-bearing depositories for their savings and with residential mortgages and loans to meet their personal and family needs. Savings banks in the State "continue to be known as thrift institutions because of their identification with the economic transactions engaged in by people of moderate means and their not-for-profit organizational structure". (Stipulation ¶¶23, 24).

Massachusetts enacted SBLI legislation the same year in which Brandeis published his article. New York, after unsuccessful efforts to enact similar legislation in 1909 and again in the early 1930's, finally did so in 1938. In 1941, Connecticut became the third and presently the final state to enact SBLI legislation.

New York's law, codified at N.Y. Bank. Law §261 *et. seq.* (McKinney 1941), authorizes State chartered savings banks to elect to establish separate insurance departments for the purpose of selling SBLI policies.[10] These departments are entitled to conduct the business of insurance "with all the rights, powers, . . . duties, . . . and restrictions relating to domestic legal reserve life insurance companies conferred or imposed by the insurance law" so far as those rights and duties are not in conflict with the State's banking law. N.Y. Bank. Law §263 (McKinney 1971). A 1940

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[10]As of December 31, 1977, sixty-eight of New York's 115 savings banks had elected to establish insurance departments. Forty-four other savings banks and insurance banks are agents for the sixty-eight issuing banks. (Stipulation ¶26).

amendment to the statutory scheme provided for the creation of the New York Savings Bank Life Insurance Fund ("The Fund"). The Fund, acting in a fashion similar to the home office of a life insurance company, provides participating savings banks with a host of technical life insurance services. The Fund, *inter alia,* (1) establishes uniform terms and conditions, including all health and acceptability standards, for the SBLI policies, (2) prescribes the exclusive "standard form" policy and furnishes the individual insurance departments with application forms and schedules, (3) fixes uniform premiums, annuity rates, loan values and surrender charges, (4) provides all actuarial, underwriting and medical services, (5) approves the issuance of every policy and the payment of every claim and (6) handles all accounting, billing and advertising. N.Y. Bank. Law § 271 (McKinney 1971). (*See also* Stipulation ¶28). The Fund obtains revenues from assessments against and contributions from participating savings banks as well as from its own investments. Notwithstanding the variety of functions that the Fund performs, each insurance department continues to own the policies that it sells in much the same way that any other insurance company owns its policies. Significantly, neither the Fund nor any other aspect of the SBLI program can be subsidized by ". . . public funds, moneys of the state or under state control or subject to audit by the state comptroller." N.Y. Bank. Law §270 (McKinney 1971).

New York SBLI insurers operate under three statutory limitations. First, all policies must be sold by salaried bank employees rather than commissioned insurance agents. N.Y. Bank. Law §269 (McKinney 1971). Second, no individual policy can be issued in excess of $30,000 per risk. N.Y. Bank. Law §266 (McKinney 1971). And finally, "[n]o application for insurance shall be accepted except from a resident of [New York State] or a person working regular-

ly therein." N.Y. Bank. Law §268 (McKinney 1971). By resolution dated April 12, 1957, the Board of Trustees of the Fund construed this provision, which has counterparts in both the Massachusetts and Connecticut SBLI legislation, as restricting "the sale of SBLI to (1) natural persons who live or regularly work in New York who insure themselves or persons with respect to whom they have an insurance interest . . . ; and (2) New York corporations, foreign corporations with their principal place of business in New York and unincorporated associations with their principal place of business in New York if they qualify for and purchase group policies." (Stipulation ¶41)."[11] The geographic limitation embodied in Section 268 was part of the original New York SBLI law. The act's legislative history, although it discusses the purposes of SBLI at some length, fails to mention this provision directly.

Notwithstanding the geographic restriction on the sale of New York SBLI, approximately $6.8 billion of SBLI was in force in New York State in 1977. (Stipulation ¶38). In 1970, New York SBLI ranked 104th in amount of insurance in force out of a total of 1800 commercial and SBLI insurers in the United States. In 1971, New York SBLI's rank was 87th and by 1974, it moved up to 70th. (*Id.*) The reason for New York SBLI's popularity is apparent. The parties agree that while "there is no difference between New York SBLI policies and commercial life [insurance] policies with respect to reliability, quality or customer satisfaction" (stipulation ¶45), there is a significant difference in price. Simply put, New York SBLI is one of the best buys in life insurance. *Best Reports,* an authoritative publication on the characteristics of life insurance, has established various categories for the net cost

[11]The parties also agree that "[p]olicyholders may retain New York SBLI if, subsequent to purchase, they move away from the state or no longer regularly work in the state." (Stipulation ¶41).

of life insurance policies to policyholders. Of the ninety-eight insurers licensed to do business in New York for which Best's ratings are both available and applicable, twenty-five, including SBLI, received the most favorable rating of "remarkably low". Of 619 insurers doing business nationwide in 1973, Best gave this rating to only forty-six. New York SBLI was also rated as one of seven insurers licensed to do business in New York whose lapse rate received the "most favorable" rating. Only nineteen of the over six hundred insurers doing business nationwide in 1973 received a comparable rating. The relatively low cost of New York SBLI policies has been said to be attributable to (1) sales by salaried bank employees, rather than commissioned agents, (2) relatively low lapse rates, (3) possible expense and federal tax advantages occasioned by the structure and operation of the insurance departments within participating savings banks and (4) favorable yields on investments.[12]

Discussion

As a threshhold matter, we note that although the Supreme Court remanded this case "in light of *Hicklin v. Orbeck*, 437 U.S. 518 (1978)," lower federal courts are obligated "to consider any change, either in fact or law, which has supervened since the original judgment was

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[12]Insurance departments of savings banks are subject to the same tax obligations as commercial insurers. (Stipulation ¶32). Although the investments made by insurance departments of savings banks are governed by N.Y. Bank. Law §235, as opposed to the provisions applicable to the investments of commercial insurers, *see* N.Y. Ins. Law §§ 46-a, 79, 81-84, the resulting differences "do not provide an inherent advantage to either of the two insurer groups over the other." (Stipulation ¶33). Over the past five years, SBLI insurers have earned 1/2% higher return on investments than the average of all commercial life insurers. (*Id.*)

entered." *See, e.g., Baird v. Benton County Board of Education*, 421 F.2d 700, 701 (5th Cir. 1970) *citing Bell v. Maryland*, 378 U.S. 226 (1964). A month prior to rendering the decision in *Hicklin*, the Supreme Court decided *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371 (1978), which, like *Hicklin*, involved an Article IV privileges and immunities clause challenge to a state statute. Accordingly, our reconsideration of the constitutionality of Section 268 of New York's Banking Law is, as the parties have assumed, in light of the teachings of both *Hicklin* and *Baldwin*.[13]

In *Baldwin*, non-resident hunters challenged the constitutionality of a Montana statute under which they were charged seven and one-half times as much as were Montana residents for the privilege of hunting elk and other animals in the state. The Supreme Court, in an opinion authored by Justice Blackmun, upheld the statute on the ground that the interest asserted by the plaintiffs was not protected by the privileges and immunities clause. The Court reasoned:

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation

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[13]Although much of our discussion may be applicable to both plaintiffs' commerce clauses and Article IV privileges and immunities clause arguments, *see* pp. 14-15, *infra citing inter alia Hicklin v. Orbeck*, 437 U.S. at 531-32, we consider the Supreme Court's remand to be directed at plaintiffs' privileges and immunities clause challenge since *Hicklin*, and for that matter *Baldwin* as well, did not involve a commerce clause challenge to the statute there under attack.

> as a single entity must the State treat all citizens, resident and nonresident, equally.

Id. at 383. The Court concluded that equal access to hunt Montana elk for recreational purposes, unlike the right to practice one's livelihood or to institute actions in the courts of any state, was not a "fundamental" right and thus was outside the scope of the privileges and immunities clause. *Id.* at 389.

Hicklin v. Orbeck presented the Court with a somewhat different issue. In *Hicklin,* plaintiffs challenged the constitutionality of the Alaska Hire statute which required employers to give an absolute preference to Alaska residents for all jobs which resulted in any way from Alaska's decision to develop its oil and gas resources. The Court, in a unanimous opinion by Justice Brennan, had little difficulty with the issue of whether or not access to employment opportunities was a protected activity under the privileges and immunities clause. It held that plaintiffs' appeal to the protection of the clause was "strongly supported by [the] court's decisions holding violative of the Clause State discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Hicklin v. Orbeck, supra,* 437 U.S. at 524. The Court, went on to declare the statute unconstitutional because it did not satisfy the two-prong standard first enunciated in *Toomer v. Witsell,* 334 U.S. 385 (1948) in that (1) there was no showing that nonresidents were "a peculiar source of the evil" that the statute was enacted to remedy, and (2) the discrimination against nonresidents did not bear a "substantial relationship" to the problem they allegedly presented. *Id.* at 526-27.[14]

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[14]Although this language appeared in *Toomer,* the *Toomer* court also stated, as this court noted in its previous opinion, that the clause:

Baldwin and *Hicklin* when read together, as we believe they must be, create a two-tier mode of analysis for resolving whether or not a statute withstands scrutiny under the inter-state privileges and immunities clause. *See generally* The Supreme Court, 1977 Term, 92 *Harv. L. Rev.* 57, 75-86, *Salla v. County of Monroe*, 48 N.Y.2d 518; 423 N.Y.S.2d 878, 399 N.E.2d 909 (1979) (U.S. *appeal pending*). The first step requires determining whether the right that nonresidents are prohibited from exercising is so "basic" or "fundamental" that interference with it "would frustrate the purposes of the formation of the Union. . ." *Baldwin v. Montana Fish & Game Commission, supra,* 436 U.S. at 387. If such a protected activity is found, the second step involves analyzing that activity under the "peculiar evil" and "substantial relation" tests employed in *Hicklin*. This two-prong standard embodies the competing concerns of the privileges and immunities clause: a recognition that federalism presumes an area within which states may legislate with little judicial oversight and the need to remove from citizens of each state "the disabilities of alienage of other States" when important individual rights are involved. *See Baldwin v. Montana Fish & Game Commission, supra,* 436 U.S. at 380-81 & n.19 *quoting*

> does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analysing local evils and in prescribing appropriate cures.

Consumers Union Inc. v. Albright, 427 F. Supp. at 845 *citing Toomer v. Witsell*, 334 U.S. at 396 (footnotes omitted). *See also* note 20, *infra.*

Paul v. Virginia; see also The Supreme Court, 1977 term, 92 *Harv. L. Rev.* 57, 80-81 (1978).

Our initial question therefore is whether New York's decision to make New York SBLI available only to individuals who live or work in the State threatens a basic or fundamental right essential to the well-being of the Union. "Merely to ask the question seems to provide the answer." *Baldwin v. Montana Fish & Game Commission*, 436 U.S. at 388. The right of equal access to a particular type of life insurance simply is not comparable to such rights as the right to practice one's livelihood, *Mullaney v. Anderson*, 342 U.S. 415 (1952), *Toomer v. Witsell*, 334 U.S. 385 (1948), *Ward v. Maryland*, 12 Wall. 418 (1870), the right to own and dispose of private property, *Blake v. McClung*, 172 U.S. 239 (1898), or the right to institute and maintain actions in courts of a state, *Canadian Northern R. Co. v. Egger*, 252 U.S. 553 (1920). *See also Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3,230) (CCED Pa. 1825).

Relying primarily on Chief Justice Burger's concurring opinion in *Baldwin*, plaintiffs argue that the right affected by Section 268 of New York's Banking Law falls within the protected sphere of the privileges and immunities clause because the clause "assures noncitizens the opportunity to purchase goods and services on the same basis as citizens." *Baldwin v. Montana Fish & Game Commission*, 436 U.S. at 394 (Burger, C.J., concurring).[15] In continu-

[15]Plaintiffs also rely upon broad dicta from *Ward v. Maryland*, 12 Wall. 418, 430 (1870) (". . . the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union . . . to acquire personal property . . ."); *Paul v. Virginia*, 8 Wall. 168, 180 (1868) ("the clause was intended to provide nonresidents . . . the same freedom possessed by citizens of those states in the acquisition and enjoyment of property"); and *Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3,230) (CCED Pa. 1825) (a state may not interfere with the "right of a citizen of one state . . . to take, hold and dispose of property, either real or personal . . .").

ing to explain the scope of the clause, the Chief Justice stated that "it confers the same protection upon the buyer of luxury goods and services as upon the buyer of bread." *Id.* While we have no quarrel with these general principles, we would distort both their meaning and the delicate balance of the federal system if we were to hold that the type of "goods and services" that they envision includes New York SBLI – a legislatively created, non-state subsidized, social welfare program. In asserting that the right of equal access to New York SBLI fits within the "basic" or "fundamental" category, plaintiffs also rely on a series of commerce clause cases which stand for the broad proposition that "a State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928); *see also H.P. Hood & Sons, Inc. v. Dumond*, 336 U.S. 525, 539 (1949); *Pennsylvania v. West Virginia*, 262 U.S. 553, 597 (1949); *West v. Kansas Natural Gas*, 221 U.S. 229, 255 (1911). We believe, however, that "[a]n entirely different question is presented . . . when a state seeks to preserve for the enjoyment of its citizens a 'resource' it has created through its own efforts." *Salla v. County of Monroe*, 48 N.Y.2d at 527; 423 N.Y.S.2d at 885, 399 N.E.2d at 916 (Gabrielli, J., dissenting) *citing* L. Tribe, *American Constitutional Law* [1979 Supp.] pp. 38-39; *Baldwin v. Montana Fish & Game Commission, supra.*[16]

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[16]In *Salla*, the New York Court of Appeals struck down a New York statute which required the state, its subdivisions and contractors in their employ to give an employment preference on all public works projects to New York residents. Judge Gabrielli, writing for himself and Judge Cooke, dissented and reasoned as follows:

> While it is true that a state may not baldly exploit its passive ownership of a resource by indirectly using it as a

In reaching this conclusion, we draw upon cases adjudicated under both the privileges and immunities clause and the commerce clause since their "mutual reinforcing relationship", "common origin in Article IV or the Articles of Confederation", and "shared vision of federalism" have been repeatedly noted. *See e.g., Hicklin v. Orbeck*, 437 U.S. at 531-32 *citing Baldwin v. Montana Fish & Game Commission*, 436 U.S. at 379-80; *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975). Some initial guidance is offered by *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). There, the Supreme Court was confronted with a Maryland statute in which the State agreed to purchase crushed automobile hulks from scrap processors at premium prices in order to remove abandoned vehicles from the State's roadways. Virginia scrap processors claimed that Maryland violated the commerce clause by effectively refusing to purchase hulks from out of state processors. After recognizing that the case presented "a situation. . . without precedent", *id.* at 807, the Court held that Maryland's action was not "the kind of action with which the commerce clause [was] concerned" because the State had not interfered with the natural functioning of the interstate hulk market but merely had entered that market as a purchaser which chose to give its business to in-state sellers. *Id.* at 806-08. While *Alexandria Scrap* is admittedly distinguishable in many respects from the case at bar, it, at a minimum, "suggests a growing judicial solicitude for efforts by states to protect the. . . needs of

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basis for requiring discrimination against nonresidents in private hiring, nothing in *Hicklin* or the case preceding it suggests that when a state has created a resource such as job opportunities, it cannot direct that the resource be used to the advantage of its own citizens.

Salla v. County of Monroe, 48 N.Y.2d at 529, 423 N.Y.S.2d at 886, 399 N.E.2d at 917.

their residents. . ." L. Tribe, *American Constitutional Law* 336, 337-38 (1978).

Most recently, in *Reeves, Inc. v. Stake*, 48 U.S.L.W. 4746 (June 17, 1980), a concrete distributor with its facilities in Wyoming claimed that a South Dakota owned and operated cement plant could not, in the face of increased demands and limited supply, enact a policy "of supplying all South Dakota customers first" and allocating the remaining volume on a first-come first-served basis. The Supreme Court disagreed. Reaffirming the holding of *Alexandria Scrap*, the Court held that the commerce clause did not forbid South Dakota, in the absence of congressional action, from participating in the market and exercising its right to favor its own citizens. *Reeves, Inc. v. Stake*, 48 U.S.L.W. at 4751.

The *Reeves* decision is instructive in two salient respects.[17] First, the petitioner in *Reeves* argued that "if a state . . . were allowed to hoard its commodities or

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[17]For the purposes for which this court relies on *Reeves*, we need not reach the question of whether the State of New York became a "participant" in the industrial life insurance market by merely creating, and not itself purchasing or selling, a form of insurance. We note, however, that SBLI, by providing an alternative to commercial life insurance, both responded to a public need and altered market patterns in the industry. At the Fifth Anniversary Dinner of Savings Bank Life Insurance, the then Superintendent of Banks noted:

[t]wo of the insurance companies which were formerly very active in writing industrial insurance have been relaxing their efforts in this field since savings banks in the State began to write life insurance. The number of their industrial policies in force declined about 2,000,000 in the four years ended December 31, 1942. The gain in ordinary life policies of these companies during the same period fell far short of compensating for the reduction in the number of industrial policies.

(Joint App. 157). *See also Salla v. County of Monroe*, 48 N.Y. 2d at 526-27; 423 N.Y.S.2d at 884-85, 399 N.E.2d at 916 (1979) (Gabrielli, J., dissenting).

resources for use of their own residents only, . . . Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines. *Id.* at 4750. *See also West v. Kansas Natural Gas Co.*, 221 U.S. at 255. One of the grounds upon which the Supreme Court rejected this argument was that the petitioner had not demonstrated that "South Dakota possesses unique access to the materials needed to produce cement." *Reeves, Inc. v. Stake*, 48 U.S.L.W. at 4750. In the case at bar, plaintiffs similarly claim that Section 268 is unconstitutional because New York, in effect, has embargoed the exportation of SBLI. Plaintiffs' Brief at 16-17. This claim must be rejected, as it was in *Reeves*, since New York hardly has unique access to SBLI. As the defendant cogently argues, each state is free to create its own SBLI in "a condition of plentitude" and each state's SBLI program operates without disadvantaging any other state's program.[18] *Cf.*

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[18] *Austin v. New Hampshire*, 420 U.S. 656 (1975), strenuously relied upon by the plaintiffs, is inapposite. In *Austin*, Maine residents who worked in New Hampshire challenged the New Hampshire income tax system which taxed non-residents on the income they earned in New Hampshire but did not levy any tax on the income earned by New Hampshire residents. The State argued that the tax did not impose any burden on the plaintiffs and thus did not violate the privileges and immunities clause because Maine awarded a tax credit to its residents for income taxes paid to another state and in so doing shielded its residents from the effects of the New Hampshire tax. In striking down the statute, the Court held that Maine's tax credit provision could not cure the constitutional defect in New Hampshire's statute because Maine was at liberty, and in fact even encouraged, to retaliate against New Hampshire by eliminating its credit provision for taxes paid to that state. *Id.* at 666-67. Thus, the Court stated that "the constitutionality of one State's statute affecting non-residents [cannot] depend upon the present configuration of the statute of another state." *Id.* at 668. As this court noted in its previous opinion, "[t]he affirmative

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (payment of bounties by a state in a manner that favors in-state processors does not violate the commerce clause when the state does not interfere with the "natural functioning" of interstate market). Thus, any individual ineligible for New York SBLI by virtue of Section 268 remains free to do precisely what his New York counterpart did -- petition his state legislators to create a form of low cost high quality industrial life insurance designed to meet the needs of its wage earners of moderate means.[19]

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burden of a tax as a condition for working in-state is very different from the denial of a benefit to out-of-state citizens under Section 268." *Consumers Union v. Albright*, 427 F. Supp. at 846 & n.10. One reason for this distinction is that the former is much more likely to induce retaliation than the latter. *See Austin v. New Hampshire*, 420 U.S. at 662-63 *quoting Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920) ("to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the constitution"). A second distinguishing feature is the type of retaliation likely to occur. The retaliatory action envisioned in *Austin* involved an unwarranted burden upon the residents of Maine by causing them to pay income tax on the same money in two states. The type of retaliation resulting from Section 268, in contrast, only involves leaving other states free to enact SBLI for the benefit of individuals with an economic nexus with those states.

[19]Even if excluded nonresidents do not succeed in enacting SBLI legislation in their states, defendant cogently argues that nonresidents are not discriminated against by Section 268 because they are still able to purchase some commercial life insurance policies which are just as inexpensive and which contain similar terms and conditions as SBLI. (Stipulation ¶¶44-48). This court's prior opinion assumed that SBLI was less expensive than comparable commercial life insurance to avoid any dispute of a material fact in deciding plaintiffs' motion for summary judgment. *Consumers Union v. Albright*, 427 F. Supp. at 843 n.7. Whatever dispute existed between the parties on this point in the prior proceedings has been resolved by the above-cited paragraphs of the stipulation.

This brings us to the second noteworthy aspect of *Reeves*. The *Reeves* Court noted that voiding South Dakota's "residents only" policy "would interfere significantly with a State's ability to structure relations exclusively with its own citizens" and "threaten the future fashioning of effective and creative programs for solving local problems", *Reeves, Inc. v. Stake*, 48 U.S.LW. at 4749. *See also id.* at 4748-49 n.10 *citing National League of Cities v. Usery*, 426 U.S. 833 (1976). We believe that comparable considerations of the "role of each State 'as guardian and trustee for its people'", *id.* at 4748-49, are involved in this case. When Governor Lehman urged the New York legislature to adopt SBLI, he described it as a form of "social insurance", much like New York's Workmen's Compensation Law, Old Age Law, and the Unemployment Insurance Law, requiring governmental initiative to provide "a greater degree of economic security for [o]ur low-paid wage earners" who were disadvantaged by the industrial life insurance policies then offered. (Joint App. 143). Notwithstanding the fact that the program did not require, and in fact expressly prohibited state funding, the Governor noted that the benefits of the proposed law would not be limited to the State's lowest paid wage earners who were most likely to become policyholders:

> To the extent that our lowest paid workers purchase [SBLI], the public relief burden of the general taxpayer will be proportionally reduced.

(*Id.* at 144). When SBLI legislation was finally enacted in 1938, Governor Lehman hailed the program as "a great social experiment" which should be helpful to lower income groups . . ." *(Id.* at 146). As the Supreme Court reiterated in *Reeves,:*

> [t]o stay experimentation in things social and economic is a grave responsibility. Denial of the

> right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Reeves, Inc. v. Stake, 48 U.S.L.W. at 4749 *quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). We hold that New York's "social experiment" aimed at providing individuals who have an economic tie with the State with a safe and inexpensive form of life insurance does not contravene the inter-state privileges and immunities clause.[20]

Plaintiffs strenuously argue that SBLI cannot be characterized as a "state resource" or a "benefits program" simply because New York SBLI neither requires nor can receive state funding. Plaintiff [sic] Reply Brief at 7-11. We

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[20]Our analysis of the nature of the right that individuals without an economic nexus to New York are prohibited from exercising by Section 268 makes it unnecessary to subject the challenged statute to the "peculiar evil" and "substantial relation" tests enunciated in *Toomer* and *Hicklin*. We note in passing, however, that both of these cases involved situations in which states sought to justify the "exclusion" of nonresidents from a scarce resource (*i.e.*, coastal shrimp and jobs) when neither the exclusionary classification nor the related aspects of the state plan served the purported purposes of the statutes. This situation is dramatically different from the one presented by this action in which New York has enacted a social welfare insurance program to eliminate abusive practices in a particular industry and has defined the benefited class to include only individuals with an economic nexus with the State. "As in any other social or public benefit program, the benefited class under §268 consists of individuals who are appropriate objects of New York's legislative concern, or those who will receive the *"good"* the program will provide, rather than those who are the source of the *evil*, or whose welfare is the legitimate concern of another State." Defendant's Brief at 19-20 (emphasis added).

disagree. The fact that SBLI is able to provide blue-collar workers with a degree of economic security and reduce New York's relief burden without any cost to the State is a testament to the program rather than a reason for its unconstitutionality. Moreover, while Sections 261-263 of New York's Banking Law authorize savings banks to establish life insurance departments to conduct "the business of issuing life insurance", New York SBLI is much more than another form of state regulation of the activities of state chartered savings banks. *Cf. Lewis v. BT Investment Managers, Inc.*, 48 U.S.L.W. 4638, 4641 (June 9, 1980). It is a legislatively created alternative to commercial industrial life insurance which was designed to eradicate certain perceived social evils. *See* Stipulation ¶19 *citing* L. Brandeis, "Savings Bank Life Insurance for Wage Earners,", *1907 Albany Law Journal* 50. As such, New York's decision to limit the availability of SBLI to those who are the most appropriate objects of New York's legislative concern does not render Section 268 unconstitutional.

Conclusion

Accordingly, on remand, defendant's motion for summary judgment is granted and the Clerk is directed to enter judgment dismissing the complaint.

So Ordered.

Dated: New York, New York
August 14, 1980.

_____
U.S.D.J.

_____
U.S.D.J.

_____
U.S.D.J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN, *Plaintiffs,*	)	Civil No.
v.	)	74 CIV 234 (LPG)
MURIEL SIEBERT, Superintendent of Banks of the State of New York *Defendant.*	)	

NOTICE OF APPEAL

Consumers Union and Edward Gorin hereby give notice that pursuant to 28 U.S.C. §1253, they will appeal directly to the United States Supreme Court from the judgments of the three-judge district court entered August 14, 1980, granting defendant's motion for summary judgment on remand and denying plaintiffs' motion for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Notice of Appeal was mailed by first class, postage prepaid, on September 12, 1980, to:

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/s/ MARK A. CYMROT

MARK A. CYMROT

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-801

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

against

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Questions Presented

1. Is an individual's interest in purchasing savings bank life insurance protected by the Privileges and Immunities Clause, Article IV, § 2, of the United States Constitution?

2. If so, may New York's limitation on the sale of savings bank life insurance to residents and individuals working regularly in state be upheld as reasonably related to the state interests reflected in the enactment of a savings bank life insurance program and as non-discriminatory with respect to any excluded nonresident?

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Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-801

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

against

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The appellee moves under Rule 16(1)(c) and (d) of the Rules of the Supreme Court to dismiss this appeal from a unanimous judgment of a three-judge district court (A. 1a-22a†), convened in the Southern District of New York, or to affirm that judgment.

The judgment on appeal upholds New York Banking Law § 268 under the interstate Privileges and Immunities Clause of the federal constitution. The state statute limits the sale

† References preceded by the letter "A" refer to the appendix to the Jurisdictional Statement filed on this appeal.

of savings bank life insurance (or "SBLI") to residents and individuals working regularly in New York. Section 268, with Banking Law § 266, limiting SBLI policies to $30,000 per risk, and Banking Law § 269, requiring the sale of SBLI policies by salaried employees of savings banks, describe the class of individuals who may benefit from New York's SBLI program, the maximum benefit they may receive and the means by which the benefit is to be provided. Substantially identical limitations on the SBLI program were included in New York's original legislation (N.Y. Laws of 1938, c. 471 [Livingston-Piper Act]) as well as in the original legislation in Massachusetts and Connecticut, the only other states that offer SBLI. Opinion below, A. 8a-9a; Stipulation ¶¶ 20, 39.* These limitations remained in force in all three states when this case was last submitted to the three-judge court. Stipulation ¶ 39.**

The judgment was entered after this Court vacated the three-judge court's original judgment, *Consumers Union of the United States, Inc.* v. *Albright,* 427 F. Supp. 840 (S.D.N.Y. 1977), and remanded the case "for further consideration in light of *Hicklin* v. *Orbeck,* 437 U.S. 518

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* The record in support of opinion and judgment below consists of a 50 paragraph stipulation of agreed facts, referenced on this motion as "Stipulation ¶ ," and a 297 page appendix of plaintiffs' and defendant's exhibits, referenced by exhibit designation, "Plfts. Exh. " or "Deft. Exh. ," and by appendix page, "Joint App. ."

** The only historic or current variation among the three limitations is confined to the amount of SBLI available per risk. The New York "policy ceiling" (now Banking Law § 266) was $3,000 per risk ($1,000 per single bank) when the program was enacted in 1938. It has been raised three times, in 1948, to $5,000 per risk (single bank limits also repealed), in 1958, to $10,000 per risk, and in 1967, to the current $30,000 policy ceiling. Stipulation ¶ 40. In 1979 (when the stipulation of agreed facts was executed), the Massachusetts policy ceiling was $53,000 per risk, and the Connecticut policy ceiling was $10,000 per risk. Stipulation ¶ 39.

(1978)," decided four days before the remand order. *Consumers Union of the United States, Inc.* v. *Heimann*, 437 U.S. 901 (1978). Dismissal of this appeal, or summary affirmance of the judgment on remand is sought now on the grounds that the decisions of this Court reviewed in affirmance of the judgment on remand is sought now on the opinion below foreclose consideration of the questions presented under the interstate Privileges and Immunities Clause or make it manifest that those questions do not warrant plenary consideration.

Statement of the Case

A. Savings Bank Life Insurance in New York

In 1907, Louis Dembitz Brandeis proposed that the legislatures of the several states enact savings bank life insurance programs to provide people of modest income with an alternative to "industrial" or "workingmen's" insurance. Opinion below, A. 6a; Stipulation ¶ 19.* Investigations of the life insurance industry substantially contemporaneous with the Brandeis proposal established that industrial life insurance was then sold at twice the cost of ordinary life insurance. Opinion below, A. 5a; Stipulation ¶¶ 15, 16. Approximately half of industrial policies lapsed within a year, and one-third did not survive three months. *Ibid.* An insured could not obtain equity in his policy until it had been in force for five years (*Ibid.*) and was not entitled to share in company profits or surplus at any time. Stipulation ¶ 22. The solicitation of new business, fed by agent commissions and high lapse rates,

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* Industrial life insurance was attractive to people in this income because it was sold in small face amounts (generally not more than $1,000) for weekly or bi-weekly premiums (generally less than one dollar). Opinion below A. 4a; Stipulation ¶ 12. Medical examinations were not usually required, and premiums were collected at the insured's home by a company agent. *Ibid.*

was highly aggressive, and the profits of the two major commercial life insurers, Prudential Insurance Company of America and the Metropolitan Life Insurance Company depended on their industrial (rather than their ordinary) life business and, particularly, on their income from surrendered and lapsed industrial policies. Stipulation ¶¶ 12, 15, 16. On these findings, industrial life insurance was then fairly characterized as providing little or no protection at exhorbitant cost for those least able to pay for it but most in need. Stipulation ¶ 19; Deft. Exh. A, L.D. Brandeis, "Savings Bank Life Insurance for Wage Earners," 1907 Albany Law Journal 50, Joint App. 119.

Brandeis addressed these circumstances by proposing the creation of an alternative form of insurance, to be known as savings bank life insurance, which would attract the traditional purchasers of industrial insurance. *Ibid.* SBLI would be sound, reasonably priced insurance, issued in amounts that would provide the modest income group with the opportunity to obtain the economic security denied them under then prevailing industrial practices. *Ibid.* It would be created by legislative enactment and sold through state chartered savings banks. *Ibid.** Brandeis' initial proposal (Deft. Exh. A, Joint App. 119) and his lobbying efforts in several states (Deft. Exh. B, Joint App. 129) establish that he intended SBLI to be an optional state program. Each state legislature was to decide whether or not SBLI was an appropriate 'remedy', and adopt or reject the program as it saw fit. Concomitantly, any state legislature that adopted the program was to act within the purview of its own interests, i.e.,

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* Brandeis selected savings banks to implement his proposed insurance program because of their record of success in meeting the banking needs of the economic group to which SBLI was directed, their not-for-profit structure and frugal management practices. In addition, the savings banks' pre-existing locations, goodwill and spill-over business would reduce the start-up and operating costs of the new SBLI program. Opinion below, A. 6a-7a; Stipulation ¶¶ 23, 24, Deft. Exh. A, Joint App. 122.

provide SBLI only for those individuals whose economic welfare was of legitimate concern to the enacting state. Thus, the Masschusetts SBLI program, adopted in 1907 (Stipulation ¶ 20), contained a state-relation, or 'geographic' requirement, of living or working regularly in the state, as did the original SBLI legislation in New York and Connecticut. Stipulation ¶¶ 20, 39. That Brandeis approved this requirement is established by the fact he included the state option component in his proposal,* that he urged New York to adopt the same legislation as Massachusetts (which included the state-relation requirement) (Deft. Exh. B, Joint App. 129), and that he did not oppose the requirement at any time between his initial proposal and his death in 1942 notwithstanding the intervening enactment of the Massachusetts, New York and Connecticut legislation. Compare Jurisdictional Statement, p. 17, suggesting that the state-relation requirement, Banking Law § 268 in New York, is inconsistent with Brandeis' 1907 proposal.

The New York legislature refused to adopt an SBLI program when it was first proposed in 1909. Stipulation ¶ 20. However, as early as 1906, the legislature responded to the investigatory findings that prompted the Brandeis proposal by enacting limitations on the expenses that commercial life insurance companies could incur. Stipulation ¶ 22. Particular emphasis was placed on expenses incurred in the acquisition of new business. Stipulation ¶ 22. Between 1938, when New York adopted an SBLI program, and 1941, the legislature acted specifically and extensively with respect to industrial insurance. Standard terms for industrial policies were required, including,

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* State option is a nullity without a state-relation requirement since, absent the requirement, the enactment of SBLI in one state, creates a nationwide SBLI market. In such circumstances, the legislatures of the several states would be deprived of the choice of adopting or rejecting SBLI, a choice Brandeis plainly intended them to have. Deft. Exh. A, Joint App. 119 and discussion above.

the right to pay premiums at the insurer's office and save home collection expenses, rights to reinstatement, certain non-forfeiture benefits, cash values after a policy had been in force for a short period, and the right to have the company's divisible surplus ascertained and apportioned annually. Stipulation ¶ 22. Insurers were also prevented from making a charge against their agents' commissions for surrendered or lapsed policies, and licensure of industrial insurance agents was required as of 1940. *Ibid.* As a result of these legislative reforms, industrial insurance is more strictly regulated in New York than in any other state. Stipulation ¶ 17.

New York's SBLI program has a two fold purpose: to provide individuals of modest income with an alternative to industrial insurance, thereby enhancing their economic security in the manner that Brandeis believed would be most effective; and to minimize the risk to the state and local treasuries that would be required to pay public assistance to individuals who were willing to assume financial responsibility for themselves but were unable to do so because sound, reasonably priced insurance was not readily available to them. Opinion below, A. 20a-21a. In 1938, then Governor Herbert H. Lehman, urging the legislature to adopt SBLI, described it as a form of "social insurance," requiring "governmental" "initiative," whose purpose was to provide "a greater degree of economic security" for New York "wage earners" who were disadvantaged by the industrial life insurance policies then available. Deft. Exh. C1, Joint App. 143-44. The Governor also referred expressly to the second purpose of SBLI in New York (*Id.* at 144): "To the extent that our lowest paid workers purchase [SBLI], the public relief burden of the general taxpayer will be proportionately reduced." When SBLI was adopted, Governor Lehman described it as "a great social experiment which should be helpful to the lower income groups which now have to depend solely on industrial insurance." Deft. Exh. Cc, Joint App. 1466.

Under the New York legislation, savings banks that elect to participate in the SBLI program (now 68 issuing banks with 44 agent banks, Stipulation ¶ 26) have the "rights, powers [and] duties . . . [of] domestic legal reserve life insurance companies" only to the extent that such rights, powers and duties are applicable and not in conflict with provisions of the state's Banking Law." Opinion below, A. 7a; Stipulation ¶ 27. The three limitations that are incidents of all SBLI programs, i.e., the state-relation requirement (Banking Law § 268 in New York here in issue), policy ceilings and sales exclusively by salaried employees, are illustrative of the differences in the 'rights' of SBLI insurers and commercial, domestic legal reserve insurers. In addition, SBLI insurers in New York must operate through a savings bank life insurance fund ("the Fund") established in 1940. Stipulation ¶ 28. Although each issuing SBLI bank is separately chartered and retains its own profits, the Fund treats all SBLI banks as members of a unified system, requiring and providing standardized policies, medical assessments, and accounting and actuarial procedures, including distributing the mortality experience of each SBLI bank across all SBLI banks. Opinion below, A, 7a-8a; Stipulation ¶ 28. Commercial insurers have not 'right' to those procedures and thus do not obtain the automatic economies of scale and distribution of risks available to SBLI insurers. Compare jurisdictional Statement, pp. 3, 4-5, suggesting that SBLI and commercial insurers have the same rights and operate in the same manner.

New York SBLI is a success in terms of its legislative purposes. In 1974, it ranked 70th in amount of insurance in force among 1800 commercial and SBLI life insurers in the United States, and 6th in sales of individual policies among 114 life insurers doing business in New York. Opinion below, A. 9a; Stipulation ¶ 38. Since all of New York's SBLI sales are limited by the state-relation requirement (Banking Law § 268) and $30,000

policy ceiling (Banking Law § 266), it is apparent that SBLI is reaching large numbers of individuals in the modest income group whose economic security and potential dependence on the state were of express concern to Brandeis and Governor Lehman. In contrast to the growth of New York SBLI, industrial insurance business in New York has declined. In 1939, the lives of New York residents were insured by $3.5 billion in industrial policies. Stipulation ¶ 13. By 1976, the amount had dropped to $1.4 billion. *Ibid.* Whether this decline in industrial insurance is attributable to the competition generated by SBLI, as Brandeis contemplated, or to the reduced profitability of industrial policies after the legislature's extensive regulation between 1938 and 1941 (see discussion, pp. 5-6, *ante*), or to a combination of both factors, is unknown.

There are no substantial differences between the terms and conditions of the whole life and term policies now offered by New York SBLI and commercial insurers except for the $30,000 policy ceiling applicable to SBLI. Opinion below, A. 9a; Stipulation ¶¶ 44, 45. In addition, New York SBLI is sound, relatively low cost insurance. Opinion below A. 9a-10a; Stipulation ¶ 47. However, while it is a 'good buy' in life insurance, it is not the 'best buy.' Of the 98 life insurers licensed to do business in New York, including SBLI, SBLI and 24 others are rated "remarkably low" in cost by *Best Reports,* considered on authoritative source in the field. Opinion below, A. 10a; Stipulation ¶ 47. Of this group, 21 are agent insurers, and 4 are non-agent insurers. Stipulation ¶ 47. Of 619 commercial life insurers doing business nationwide, *Best Reports* has assigned 46 the same "remarkably low" cost rating, it assigned to New York SBLI. Opinion below, A. 10a; Stipulation ¶ 47. The lapse rate of SBLI policies is also favorable, but no different than at least 6 commercial insurers doing business in New York which, along with New

York SBLI, have received *Best Reports'* most favorable rating of "very low." Opinion below, A. 10a; Stipulation ¶ 48. Of this group, 2 are agent insurers, and 5 are non-agent insurers. Stipulation ¶ 48. Of 626 commercial life insurers doing business nationwide, *Best Reports* has assigned 19 the same "very low" lapse rating, it assigned to New York SBLI. Opinion below, A. 10a; Stipulation ¶ 48.

B. The Questions Properly before this Court and the Opinions Below

Appellants' question presented (Jurisdictional Statement, p. i) is erroneous in that it includes a former Commerce Clause claim against Banking Law § 268 which did not survive the Court's remand of the case on June 22, 1978, *sub nom. Consumers Union of the United States, Inc.* v. *Heimann,* 417 U.S. 518. The remand order states in terns that it is "for further consideration in light of *Hicklin* v. *Orbeck,* 437 U.S. 518 (1978)." 437 U.S., *supra,* at 518. The opinion of the three-judge court on remand correctly identifies *Hicklin* (as well as *Baldwin* v. *Montana Fish & Game Commission,* 436 U.S. 371 [1978] which it also considers) as cases brought under the interstate Privileges and Immunities Clause. It therefore reads this Court's instruction as limiting the remand to appellants' claim under that Clause, and does not discuss, or rule on, any other claim. Opinion below, A. 11a n. 13.* The Jurisdictional Statement now before the Court does not assign error to the three-judge district court with respect to its finding on the scope of the remand order or even suggest why that finding is wrong. It simply includes a Commerce Clause claim in the question presented without further procedural or substantitive discussion. See e.g. Jurisdictional Statement, Argument, wherein the Commerce Clause claim is not specifically addressed. The questions presented by appellee (p. i, *ante*) correct appel-

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* The opinion on remand does recognize the mutually reenforcing relationship between the interstate Privileges and Immunities Clause and the Commerce Clause and discusses the leading cases decided under both Clauses. Opinion below, A. 11a n. 13, 14a-22a. See *Hicklin* v. *Orbeck,* 437 U.S., *supra,* at 531-34, citing and analyzing decisions under the Commerce Clause in support of interstate Privileges and Immunities Clause holding.

lants' error in this regard by eliminating all references to the Commerce Clause.*

Appellants' question presented is also erroneous in that assumes that an individual's interest in purchasing SBLI is 'fundamental' and thus within the protection of the interstate Privileges and Immunities Clause, and that Banking Law § 268 'discriminates' against that interest, thereby requiring appellee to show that the statute is supported by independent, non-discriminatory reasons and that the classification it establishes is narrowly drawn. Both issues were decided adversely to appellant below, and necessarily form the subject matter of this appeal. They cannot be presented as decided in appellants' favor at this point in time. The questions presented by appellee correct appellants' errors in this regard. Inquiry is directed first to the threshold question of whether an individual's interest in purchasing SBLI is protected by the interstate Privileges and Immunities Clause (Question 1). If so, inquiry is directed to the issues which must be decided to determine the constitutional validity of state imposed restrictions on such protected, fundamental interests (Question 2).

Several other errors appear in appellants' characterization of the prior opinions. The opinion below does not reaffirm the three-judge court's earlier holding that nonresidents do not have a 'fundamental' right to purchase SBLI under the interstate Privileges and Immunities Clause. Compare Jurisdictional Statement, p. 1. The earlier opinion accepted *arguendo* that a purchaser's interest in SBLI was sufficient to warrant the protection of the Clause. *Consumers Union of the United States Inc.* v.

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* Appellants' Commerce Clause claim against Banking Law § 268 claim was separately briefed by both sides on the remand. It is separately treated at subpoints C and D of the argument section of this motion in the event that this Court finds that it is properly presented

Albright, 427 F. Supp. 840, 845-46 (S.D.N.Y. 1977). It then upheld Banking Law § 268 under the Clause, finding the reasons alleged in its support valid and substantial, *Ibid.* See also Jurisdictional Statement, p. 8, apparently conceding that the original district court opinion upheld § 268 under the Clause. In contrast, the opinion below (A. 11a-22a) provides a detailed analysis of the threshold issue, finding that the purchaser's interest in SBLI falls outside the Clause. It then finds, in addition, that § 268 is nondiscriminatory (A. 18a-19a) and consistent with the substantial state interest SBLI reflects (A. 21a n. 20, 22a).

Appellants' contention (Jurisdictional Statement, p. 8) that on remand "the district court never reached an analysis of *Hicklin* v. *Orbeck*, [*supra*], as ordered by this Court" is in startling contrast to the court's express acknowledgment of the terms of the remand (A. 3a), its statement that it was reconsidering the constitutionality of Banking Law § 268 "in light of the teachings of both *Hicklin* and *Baldwin*" A 11a), and its extended discussion of each case independently (A. 11a-12a [*Baldwin*], A. 12a [*Hicklin*]), in relation to each other (A. 13a-14a) and in relation to § 268 (A. 14a-17a). If applicants' contention is an attempt to assign error to the district court for considering *Baldwin* when the remand order referenced only *Hicklin*, and/or for considering the threshold issue of whether § 268 was subject to the interstate Privileges and Immunities Clause at all since *Hicklin* had disposed of that issue in favor protection under the Clause for the employment opportunities there in issue, it must be rejected. The district court specifically addressed its obligation to consider *Baldwin* as well *Hicklin*, citing appropriate authorities Opinion below, A.. 10a-11a. Appellants do not challenge the obvious good sense of the district court's view or the supporting authorities. Nor do they question the court's comment that both sides "assumed" that the remand would proceed in light of both *Hicklin* and *Bald-*

win. Equally, appellants offer no support for their construction of the remand order as foreclosing the district court from considering the threshold issue present in all privileges and immunities cases in this case. Indeed, the suggested construction remand orders would obviously result in numerous errors and conformed sound principles of judicial decision making. See e.g. *Reeves* v. *Stake,* —— U.S. ——, 100 S. Ct. 2271, 2275 n. 4 (1980), wherein this Court noted that its remand of the case under *Hughes* v. *Oklahoma,* 426 U.S. 794 (1976), had been inapposite and agreed with the Eighth Circuit's reliance on *Hughes* v. *Alexandria Scrap, Corp.,* 426 U.S. 794 (1976). Under appellants' strict construction of remand orders, the Eighth's reliance on *Alexandria Scrap,* as well as their previously decided cases, would have been foreclosed.

ARGUMENT

Prior Decisions Of This Court Foreclose Consideration Of Appellants' Claim Against New York Banking Law § 268 Under The Interstate Privileges And Immunities Clause Or Make It Manifest That The Claim Does Not Warrant Plenary Consideration.

A. An individual's interest in purchasing New York SBLI is not protected by the interstate Privileges and Immunities Clause.

Only interests and activities that are "basic" or "essential" to the "formation, the purpose, or the development of a single Union of . . . States" are within the interstate Privileges and Immunities Clause. *Baldwin* v. *Montana Fish & Game Commission,* 436 U.S. 371, 383 (1978). Differences in treatment without this "basic" dimension outside the Clause: they "merely reflect the fact that this is a Nation composed of individual States," each with its own laws and "are permitted." *Ibid.* Even if an interest or activity has a colorable "basic" dimension, it is excluded from the Clause if it derives solely from the relationship between residents, or citizens, and their state. *Snowden* v. *Hughes,* 321 U.S. 1, 6-7 (1944). As this Court stated in *Paul* v. *Virginia,* 8 Wall. 168, 180-81 (1968): "Special privileges [created by the citizen/state relationship] enjoyed by citizens in their own States are not secured in other States by [Article IV, § 2]. . . . It was not intended by this provision to give the laws of one State any operation in other States." This is true regardless of whether a state is viewed as acting in its sovereign capacity, as in its creation of a public assistance program, or in its proprietary capacity, as in its creation or involvement in commerce. See *Reeves* v. *Stake,* —— U.S. ——, 100 S. Ct. 2271, 2277-79 (1980).

Prior decisions of this Court, correctly reviewed in the opinion belov , do not permit interests akin to the purhase

of SBLI to be considered "basic" within the meaning of the interstate Privileges and Immunities Clause. Rather, they require that the state conduct of a program such as SBLI, and perforce the sale of policies under that program, be considered exempt from the Clause.*

As the district court observed, interests which are "basic" whether the meaning of the interstate Privileges and Immunities Clause are those which affect non-residents' rights " 'to ply their trade, practice their occupation, or pursue a common calling within the State.' " Opinion below, A. 12a, quoting *Hicklin* v. *Orbeck,* 437 U.S., *supra,* at 524. "The right of equal access to a particular type of life insurance simply is not comparable to such rights as to right to practice one's livelihood" with which the accepted standard, quoted above, has been identified. Opinion below, A. 14a. Appellants do not suggest why the purchase of SBLI is comparable to earning a livelihood.

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* The only revelant decision not cited in the opinion below is *Rubin* v. *Glaser,* —— U.S. ——, 49 U.S.L.W. 3343 (Nov. 10, 1980), dismissing an appeal from a decision of the New Jersey Supreme Court reported at 83 N.J. 299, 416 A.2d 382 (1980). Therein, New Jersey's gave substantial real property tax rebates to residents who also maintained their principal places of abode within the state. The New Jersey Supreme Court held that the state's concern of alleviating the taxpayer's burden and assisting its residents in maintaining a home were sufficient to uphold the rebate program under the interstate Privileges and Immunities Clause. 416 A.2d, *supra,* 386-87. The Court's dismissal of the appeal in that case should foreclose further consideration of the questions presented herein. While both the New Jersey rebate plan and New York SBLI have a social welfare purpose, New York SBLI is specifically directed at the income group in need of aid whereas the New Jersey program provides a rebate for rich and poor homeowners alike. The New Jersey program discriminates against excluded residents and non-residents who pay higher taxes for the same or less services. New York SBLI does not discriminate against excluded non-residents. Any state can enact SBLI, and any excluded non-resident can buy life insurance on the commercial market with the same terms and conditions as SBLI for the same price. See discussion *ante,* pp. 4-5, 8-9.

They contend that there is a great deal of life insurance, both commercial and SBLI, in the market place (Jurisdictional Statement, p. 11), and that this Court (*per* the Chief Justice) has departed from the accepted standard, intending to assure non-residents the opportunity of purchasing "'goods and services on the same basis as citizens.'" Jurisdictional Statement, p. 10, quoting *Baldwin* v. *Montana Fish & Game Commission,* 436 U.S., *supra,* at 394 (BURGER, Ch. J., concurring). The first contention is obviously immaterial since the "basic" dimension of an interest or activity is assessed in terms of quality, not quantity. The second contention misreads the Chief Justice's concurrence. As reference to that opinion shows, the Chief Justice supported Montana's non-resident licensing restrictions on elk hunting and stated the accepted standard requiring a "basic" dimension for those "goods and services" protected by the interestate Privileges and Immunities Clause. Moreover, it is evident that the "goods and services" to which the Chief Justice referred were those in private trade or commerce, and not those which were the result of governmental welfare or proprietary programs. Any other reading of the Chief Justice's concurrence in *Baldwin* opposes his position with the majority in *Reeves* v. *Stake, supra,* supporting South Dakota's preference for residents in its proprietary cement enterprise.

Even if New York SBLI and the limitation on its policy sales established by Banking Law § 268 are viewed touching upon an interest with a "basic" dimension, they are exempt from the application of the clause. New York SBLI is the 'product' of the sovereign act of the state legislature, and necessarily the result of the political relationship between New York and its citizens, or residents. See *Paul* v. *Virginia, supra* and *Reeves* v. *Stake, supra.* That New York created SBLI is evident from the fact that it would not exist but for the state legislature's action in 1938. See Opinion below, A. 22a. Compare Jurisdictional

Statement, pp. 12-13, stating that New York merely 'authorized' the sale of SBLI as it authorizes the sale of commercial life insurance.*

New York SBLI is a social welfare program and entitled to the same deference from federally imposed constraints as any other state-created public benefit, or assistance, program. As the CBLI's history makes clear, it is intended to alleviate the financial distress of individuals whose recourse had been limited to industrial life insurance and to protect the state and local treasuries from their potential demands for public subsidies. See discussion, pp. 3-4, 6, *ante*. As the district court observed, SBLI is like New York's Workmen's Compensation Law, Old Age Law, and the Unemployment Insurance Law. Opinion below, A. 20a. Appellants' only contest on this point is that SBLI is not publicly funded. Jurisdictional Statement, p. 13. The district court responded appropriately (opinion below, A. 22a): "The fact that SBLI is able to provide blue-collar workers with a degree of economic security and reduce New York's relief burden without any cost to the State is a testament to the program rather than a reason for its unconstitutionality."

Indeed, once the legislature decided to create SBLI, it could have put the state into the business directly, *Osborn* v. *Ozlin*, 310 U.S. 53, 66 (1940). It could have required all banks (or other outlets) to sell it "by assigning the risk", e.g. New York Insurance Law § 63 (requiring all New York motor vehicle insurers to accept applications for liability insurance from those unable to obtain it elsewhere), Insurance Law §§ 651(6), 653(1)(a), 654 (requiring all New York fire insurers to accept applications for fire insurance

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* Commercial life insurance is a matter of private contract and exists without regard to state authorization, albeit not without regard to state regulation in the public interest. Stipulation ¶ 11. To the extent SBLI is authorized by legislative act, it is created.

from those with insurable interests in property in the state who are unable to obtain it elsewhere). See *California Automobile Association* v. *Maloney,* 341 U.S. 105 (1951). Or, it could have offered the SBLI option to some banks (i.e. savings banks), as it did, with the prospect of increased business and increased "profits" as the incentive for their participation in the program. *Osborn* v. *Ozlin, supra.* The legislature's choice of the third approach obviously did not change the purpose or character of SBLI any more than the private contributions that support social security change the social insurance or public benefit character of that program. See Defendant's Memorandum, pp. 31-32.

While appellee does not believe that New York SBLI is properly considered as a state proprietary enterprise, this Court's recent decision in *Reeves* v. *Stake* should foreclose plenary consideration of Banking Law § 268 even if it is so considered. As the Court there held, 100 S.Ct., *supra,* at 2278-80, a state that enters the market place is entitled to the same freedom as the private entrepreneur. That freedom includes selecting its own customers. *Ibid.* A state need not to pay public funds to become a 'market participant,' *Reeves* v. *Stake,* 100 S.Ct., *supra,* at 2277; *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 807-808 (1976), it need only create the enterprise.

B. Banking Law § 268 is reasonably related to substanntial state interests reflected by the savings bank life insurance program and does not discriminate against any excluded non-resident.

A state statute establishing classification between residents and non-residents with respect to an interest within the interstate Privileges and Immunities Clause must be upheld if "valid independent reasons" (other than the fact of non-residence) support the classification and "the degree of discrimination [affected by the classification] bears a close relation to them." *Toomer* v. *Whitsell,* 334 U.S. 385, 396 (1948). "[D]ue regard" is to be afforded the principle that States should have considerable leeway in analyzing local suits and in prescribing appropriate cures." *Toomer, supra.* This standard was recently reaffirmed in *Hicklin* v. *Orbeck,* 437 U.S., *supra,* at 525-26.

As the district court recognized, Banking Law § 268 satisfies the discrimination component of the standard with little difficulty since the statutes does not disadvantage any other state or any excluded non-resident. Opinion below, A. 18a-19a. New York's enactment of SBLI does not preclude any other state from enacting the same program. Thus, any excluded non-resident can obtain SBLI in the same manner and to the same extent that it has become available to the individuals included in § 268. Even if an excluded non-resident does not succeed in enacting SBLI in his own state, he suffers no disadvantage since insurance with the same terms and conditions is available from commercial life insurers at the same price. See discussion, pp. 8-9, 15 footnote.

Banking Law § 268 is also congruent with the concededly legitimate and substantial reasons which support New York's SBLI program. As noted, New York's interest in enacting SBLI was to relieve the financial distress of individuals with respect to whom it had an especial interest, both because they were within its legislative

jurisdiction and because of the demands they would make on the state and local treasuries if that distress were not alleviated. The district court recognized that these interests were perfectly consistent with § 268's limitation on policy sales to residents and persons working regularly in the state since those individuals had an economic relationship with, and potential dependence, on New York. Opinion below, A. 21a n. 20, 22a. Appellants' do not suggest any reason why New York's interest in its SBLI program should reach beyond the group of individuals now included by § 268, and none is apparent. The fact that SBLI is a good product (Jurisdictional Statement, pp. 2, 10, and discussion, pp. 7-9), albeit not the best product (discussion pp. 8-9) does not mean New York is required to, or should, impose it on other states. Indeed, appellants' position would create non-resident rights in New York SBLI which *Paul* v. *Virginia, supra* (quoted at p. 14), held were unwarranted and effectively preclude the several states from exercising their clearly intended option to adopt or reject the program. See discussion pp. 4-5.

C. Banking Law § 268 is not subject to scrutiny under the Comerce Clause

This Court's decisions prior to *United States* v. *South-Eastern Underwriters,* 322 U.S. 533 (1944), repeatedly excluded state regulation of insurance practices from scrutiny under the interstate commerce clause on the theory that insurance contracts were "not articles of commerce," "subjects of trade or barter," "commodities to be shipped from or forwarded from one State to another" or "interstate transactions, though the parties [to the insurance contract] may be domiciled in different states." *Paul* v. *Virginia,* 8 Wall., *supra,* at 183. The Court modified its position in *South-Eastern* and upheld the application of the Sherman Act to fire insurers doing business across state lines, citing the national scope and economic power of the commercial insurance industry to support its finding that the industry was engaged in interstate commerce. 322 U.S. at 539-43. *South-Eastern* was followed in 1945 by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. The Act was interpreted in *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946) (upholding 3% premium tax on nonresident insurers when no similar tax was imposed on domestic insurers), as providing Congressional approval for present and future state systems regulating or taxing insurance even though those systems would have been within the Clause had Congress remained silent. 328 U.S. at 427-32. *Prudential* was recently cited in *Lewis* v. *BT Investment Managers, Inc.,* —— U.S. ——, 100 S. Ct. 2009, 2020 (1980), for the proposition that Congress can, through affirmative legislation as in the McCarran-Ferguson Act, confer upon the states "an ability to restrict the flow of interstate commerce that they would otherwise enjoy." In citing *Prudential* in this manner, the Court has plainly restored the pre-*South-Eastern* status quo with the result that SBLI is exempt from Commerce Clause scrutiny.

D. Banking Law § 268 does not violate the Commerce Clause

Reeves v. *Stake, supra,* disposes of any claim against Banking Law § 268 since the statute conforms with the theories of both the majority and dissenting opinions. Under the majority opinion, SBLI, is, at a minimum, a proprietary enterprise and free of restraint. 100 S. Ct., *supra,* at 2277-80. As discussed above (p. 19), nonresidents' access to SBLI, or policies sold on the same terms and conditions, is even less unique than nonresidents' access to South Dakota's cement or the materials needed to make it. See also Opinion below, A. 18a. This demonstration, as well as SBLI's specific and limited social welfare purpose, meets the threshold objection of the *Reeves* dissenters that the product not be withheld for the benefit, or financial advantage, of priviate citizens and businesses within the state. 100 S.Ct., *supra,* at 2283. The dissenters further concern that the natural flow of interstate commerce not be unduly burdened (100 S.Ct., *supra,* at 2285-86) is met by the fact that unlike South Dakota's participation in the cement business, New York did not participate in a pre-existing business or trade when it created SBLI. It created a new 'product,' new 'commerce' or new 'competition' which would not have existed but for its conduct and which was not, and is not now, part of the 'natural' flow of interstate commerce. Moreover, as the dissenters note, there would have been no objection to a South Dakota policy which would bar all nonresident access, enabling South Dakota to meet its own needs exclusively. 100 S.Ct., *supra,* at 2285. While New York SBLI has no disadvantageous effect, it is directed specifically and exclusively to New York's own needs, both those of its citizens and its public treasuries, and to no others. Nothing in the prior decisions of this Court requires a state to export its own product or to create competition in other states. Compare Jurisdictional Statement, pp. 2, 10.

CONCLUSION

Upon the foregoing, the judgment below should be affirmed, or this appeal dismissed.

Respectfully submitted,

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No. 80-801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSUMERS UNION OF UNITED STATES, INC. and EDWARD J. GORIN,

Appellants,

v.

MURIEL SIEBERT, Superintendent of Banks of the State of New York,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

APPELLANTS' OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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Appellee.

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APPELLANTS' OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

The motion to dismiss or affirm was brought in support of a three-judge district court decision which upheld the constitutionality of New York Banking Law § 268 against a challenge under the Privileges and Immunities Clause, Art. IV, §2, and the Commerce Clause, Art. I, § 4, cl. 8, of the U.S. Constitution.[1] Section 268 restricts the sale of savings bank life insurance to those who reside or regularly work in New York. The district court held that the right

[1] Appellee contends that the Commerce Clause claim is not properly before the Court. Motion to Dismiss or Affirm at 10 ("Motion at ___"). However, the remand order merely ordered further consideration in light of *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). It did not reject any of appellants' claims.

to free access to New York's insurance market is not a fundamental right as defined in *Baldwin* v. *Fish & Game Commission of Montana,* 436 U.S. 371 (1978), primarily because New York "created" SBLI as a "non-state subsidized, social welfare program." App. 15a.[2] The district court reasoned that this approach was comparable to State participation in the life insurance market, and, therefore, the discrimination was justified under *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794 (1976) and *Reeves, Inc.* v. *Stake,* 100 S.Ct. 2271 (1980). App. 16a-19a.

The dispute centers around the characterization of the legislative scheme which authorizes savings banks to sell life insurance. In appellants' view, SBLI is an article in commerce, and § 268 is a discriminatory state business regulation. In the view of the district court and the appellee, SBLI was "created" by New York and, therefore, New York is entitled to discriminate against nonresidents.[3] This Court is asked for the first time to define when a State enters a market in order to come within *Alexandria Scrap* and *Reeves.*

The dispute touches upon the multi-billion dollar market for life insurance. Left intact, many millions of consumers will be denied the choice of an excellent insurance policy and also denied the benefits of competition which SBLI could create.

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[2]"App. _____" refers to the district court opinion set forth in the Appendix to the Jurisdictional Statement.

[3]In its motion, appellee attempts to obtain Louis D. Brandeis' personal endorsement for its position by suggesting that the geographical limitation was contained in Brandeis' original proposal. Motion at 5. However, the legislative history simply does not reveal when or why the limitation was included in the statute. Appellee's statement is mere speculation. Further, in a letter of June 5, 1928, to Charles H. Jones, Brandeis strongly opposed limitations on the sale of SBLI. Pltfs. Exh. 10; Joint Appendix at 116. The Joint Appendix is part of the district court record.

The Court should, therefore, order plenary consideration of this case to reverse the erroneous decision of the district court and to resolve this important issue of law.

1. Section 268 Violates A Fundamental Right of Nonresident Consumers

In *Baldwin,* this Court did not enumerate all rights which were to be considered basic under the Privileges and Immunities Clause, but said that "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." 436 U.S. at 383. In explaining the decision, the Chief Justice said in his concurrence that, "The Clause assures non-resident citizens the opportunity to purchase goods and services on the same basis as citizens. . ." *Id.* at 394. This same fundamental right was specifically enumerated by the Court using somewhat different language in earlier cases. See Jurisdictional Statement at 10-11. In appellants' view, this right is offended by the geographical limitation on the sale of savings bank life insurance.

In its motion, appellee seeks to distinguish the present case by saying, "Even if an interest or activity has a colorable 'basic' dimension, it is excluded from the Clause if it derives solely from the relationship between residents, or citizens, and their state. *Snowden* v. *Hughes,* 321 U.S. 1, 6-7 (1944)." Motion at 14. However, *Snowden* is a case arising under the Privileges and Immunities Clause of the Fourteenth Amendment which protects the rights of national citizenship. The Court said that rights granted by state statutes do not fall within the rights of national citizenship. *Ibid.* The principle is not applicable to the Article IV Privileges and Immunities Clause which is designed to assure that States grant nonresidents the same basic rights granted to residents by state law. E.g., *Hicklin* v. *Orbeck,* 437 U.S. 518, 524 (1978). In other words, appellee's proposed exception would consume the rule and must be rejected.

Appellee next argues, citing dicta in *Paul* v. *Virginia,* 8 Wall. 168, 180-181 (1868), that the Privileges and Immunities Clause is not designed to give state laws effect in other States. Motion at 14. However, appellants are merely seeking to give nonresidents who come to New York the same access to savings bank life insurance as residents have. Mr. Gorin, for instance, walked into a New York savings bank and was denied the opportunity to purchase the bank's life insurance. Stip. ¶ 4.[4] Appellee's argument is inapplicable to this case.

Since the Articles of Confederation, the Court has found that nonresidents have a fundamental right to "all the privileges of trade and commerce" for the purpose of "forming a more perfect Union." *Austin* v. *New Hampshire,* 420 U.S. 656, 660-661 (1975). Interstate commerce has been one of the primary means of fusing the Nation into a single entity. *Hughes* v. *Oklahoma,* 441 U.S. 322, 325-326 (1979). The underlying principle was set forth in *H.P. Hood & Sons, Inc.* v. *Dumond,* 336 U.S. 525, 539 (1949), when the Court said:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. *Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. (emphasis added)

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[4]"Stip." refers to the Stipulation on Remand filed in the district court.

This basic policy has never been limited to employment opportunities as suggested by appellee's statement that, "Appellants do not suggest why the purchase of SBLI is comparable to earning a livelihood." Motion at 15. In enforcing the policy under the Privileges and Immunities Clause, this Court has applied it broadly to all regulations affecting trade and commerce. The Court has required not only equal access to jobs, *Hicklin* v. *Orbeck,* 437 U.S. 518 (1978), but also equal access to natural resources for commercial use, *Toomer* v. *Witsell,* 334 U.S. 385 (1948), equal access to medical services, *Doe* v. *Bolton,* 410 U.S. 179 (1973), and equal rights to an insolvent debtor's assets, *Blake* v. *McClung,* 172 U.S. 239 (1898). In the areas of nonresidents taxes and fees, the Court has only permitted discrimination to equalize the benefits and burdens of state-funded activities and services. In effect, nonresident payments are designed to avoid discrimination against residents. E.g., compare, *Travellers' Insurance Co.* v. *Connecticut,* 185 U.S. 364 (1902) with *Austin* v. *New Hampshire,* 420 U.S. 656 (1975) (commuter taxes). The right of nonresident consumers to equal access to New York's insurance market is perfectly comparable to these previously enumerated rights.

While *Baldwin* arguably involved a form of commerce, it was not a departure from this principle. The Court found that the luxury sport of elk hunting was enjoyed by a few wealthy sportsmen. Rather than endorsing discrimination against nonresidents, the Court found that the higher nonresident fee hindered few, if any, from hunting while providing funds to protect the herd for the good of all. In other words, no significant discrimination was found by the Court.

By contrast, the discrimination created by § 268 is real and substantial. Life insurance is purchased by 86 percent of American families from the richest to the poorest. The

geographical limitation in § 268 is a total bar to the purchase of a life insurance product which ranks 70th in insurance in force among the 1800 insurers in the United States, despite its limited market. New York consumers have declared SBLI to be an excellent insurance product through their purchases. See Jurisdictional Statement at 11.

Thus, appellee's motion is in error when it argues that § 268 does not violate a fundamental right.

2. New York Has Not Entered The Life Insurance Market

In further support of their view that § 268 does not fall within the Privileges and Immunities Clause, the district court and appellee place great reliance upon *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc.* v. *Stake,* 100 S.Ct. 2271 (1980). In these cases, the States became participants in markets for automobile hulks and cement, respectively. In explaining this reliance, appellee says, " . . . it is evident that the 'goods and services' to which the Chief Justice referred were those in private trade or commerce, and not those which were the result of governmental welfare or proprietary programs." Motion at 16. The appellee goes on to assert that, "New York SBLI is a social welfare program and entitled to the same deference from federally imposed constraints as any other state-created public benefit, or assistance, program." Motion at 17. And finally, appellee concludes that, "A state need not pay public funds to become a 'market participant,' . . . , it need only create the enterprise." Motion at 18.

Appellee's argument seeks to greatly expand the Commerce Clause exception set forth in *Alexandria Scrap* and *Reeves* while at the same time mischaracterizing the nature of New York's interest in savings bank life insurance.

Contrary to appellee's assertion, the principle set forth in these cases does require an investment from the state treasury. In *Reeves,* this Court said.

> The State's refusal to sell to buyers other than South Dakotans is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve.

100 S.Ct. at 2280. When state taxpayers invest their own funds in an enterprise, this Court found that they bear the risk of loss and are entitled to benefits of the enterprise. Thus, a State does not become a market participant by "creating" the enterprise as suggested by appellee. Even the district court recognized that New York was not a market participant. The district court said:

> For the purposes for which this court relies on *Reeves,* we need not reach the question of whether the State of New York became a "participant" in the industrial life insurance market by merely creating, and not itself purchasing or selling, a form of insurance. We note, however, that SBLI, by providing an alternative to commercial life insurance, both responded to a public need and altered market patterns in the industry.

App. 17a, n.17. However, in *Reeves* this Court made it clear that the distinction between a market participant and a market regulator is the heart of the analysis. 100 S.Ct. at 2277. Therefore, the district court's analysis is faulty.

Since New York was regulating the insurance market by authorizing savings banks to sell life insurance, the district court and appellee's reliance upon *Reeves* and *Alexandria Scrap* is misplaced. New York has invested no funds in the SBLI system. Banking Law § 270 specifically prohibits the

use of state funds to support the SBLI system. The district court found that the system is "non-state subsidized." App. 15a. Banking Law § 263 states that the savings banks, "may conduct the business of life insurance and grant or sell annuities with all the rights, powers, and privileges and subject to all the duties, liabilities and restrictions relating to domestic legal reserve life insurance companies conferred or imposed by the insurance law. . . ." The insurance contracts are entered into by the savings banks and the insured. The State is not a party to the contract. The investment is made by the savings banks, the risk taken by the savings banks and the profits, if any, are retained by the savings banks and are taxed by the state. See Jurisdictional Statement at 12-13.

3. Section 268 Does Not Advance Any State Interest

Since the geographical limitation is a business regulation, it can only survive if it meets the test set forth in *Hicklin* v. *Orbeck,* 437 U.S. at 525-526. Nonresidents must constitute a "peculiar source of the evil at which the [discriminatory] statute is aimed," and there must be a "reasonable relationship" between the danger and the discrimination. *Ibid.* The State has the burden to meet this test, *Hughes* v. *Oklahoma,* 441 U.S. 322, 326 (1979) and has failed to do so.

According to appellee, "New York's SBLI program has a two fold purpose: to provide individuals of modest income with an alternative to industrial insurance, thereby enhancing their economic security in the manner that Brandeis believed would be most effective; and to minimize the risk to the state and local treasuries that would be required to pay public assistance to individuals who were willing to assume financial responsibility for themselves but were unable to do so because sound,

reasonably priced insurance was not readily available to them." Motion at 6. The geographical limitation does not advance either of these purposes, and the elimination of this limitation will not hinder either purpose.

The district court found that SBLI is created in a "condition of plentitude." App. 18a. In other words, there is no limit on the amount of life insurance that the savings bank can sell. Thus, to the extent, SBLI provides New Yorkers of modest means with an alternative to industrial insurance, that alternative will still exist even if nonresidents can purchase SBLI. The record contains no suggestion that increased sales to nonresidents will affect that alternative. If anything, the expanded risk base should make the entire system safer.

Similarly, to the extent SBLI serves to minimize public assistance,[5] it will continue to serve that function by permitting nonresidents to purchase SBLI. New York would be providing benefits to nonresidents without disadvantaging residents or draining the state treasury.

Appellee also argued that § 268 does not infringe upon the Privileges and Immunities Clause because, "New York's enactment of SBLI does not preclude any other state from enacting the same program." Motion at 19. This argument was specifically rejected by this Court in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). See Jurisdictional Statement at 14-15.

In a related argument, appellee contends that nonresidents are not disadvantaged because they have other life insurance choices. Motion at 19. However, the right to choose is a fundamental right of the individual. Also, as noted above, while other life insurance policies may have the same terms and conditions, SBLI is

[5]The record contains no evidence to suggest that SBLI actually is reducing public assistance.

"remarkably low cost" and chosen by a remarkably high percentage of New Yorkers who have the freedom to choose. See Jurisdictional Statement at 3-4, 11.

Finally, appellee contends that New York's only interest is in its residents. However, New York's interest arises from the benefits to the Nation of interstate commerce. Further, New York has no interest in excluding nonresidents from purchasing SBLI. It costs the state treasury nothing to open sales to all, and in fact, it may cost the State tax revenues to exclude nonresidents. This argument cannot be a "valid independent reason" for the severe discrimination caused by the geographical limitation.

CONCLUSION

The foregoing considered, the Court should note probable jurisdiction and set this case for full brief and argument.

Respectfully submitted,

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